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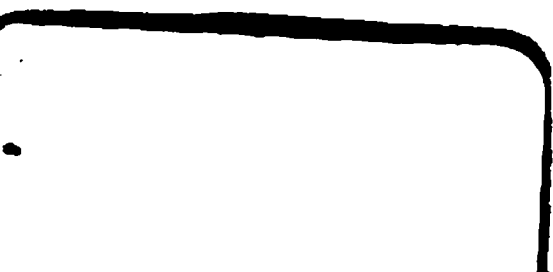
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BY JOHN E. HALL, ESQ.

COUNSELLOR AT LAW, MEMBER OF THE AM. PHIL. SOC.—PHIL. AGR.
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Seu linguam causis acuis; seu civica jura
Respondere paras.

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THE
AMERICAN LAW JOURNAL.

MASSACHUSETTS.

CIRCUIT COURT, U. S. MAY, 1814.

The Ship L'Invincible—Maisonnera, and Deruet, Claimants.

STORY, Judge. The French private armed ship *L'Invincible*, duly commissioned as a cruiser, was captured in March 1813, by the British brig of war *Mutine*. In the same month, she was recaptured by the American privateer *Alexander*; was again captured on or about the tenth day of May 1813, by a British squadron, consisting of the *Shannon* and *Tenedos*; and afterwards in the same month, again recaptured by the American privateer *Young Teazer*, commanded by William B. Dobson, carried into Portland, and libelled in the District Court of Maine, for adjudication, as prize of war. The proceedings and pleadings, so far as at present material to be stated, were as follows: At a special term of the District Court held in June 1813, a claim was interposed by the French consul, on behalf of the French owners, alleging the special facts aforesaid, and claiming restoration of the ship and cargo, on payment of salvage. A special claim was also interposed by Mark L. Hill, and Thomas M'Cobb, citizens of the United States, and owners of the ship *Mount Hope*, alleging among other things, that the said ship

No. XXI.

A

having on board a cargo on freight belonging to citizens of the United States, and bound on a voyage from Charleston, South Carolina, to Cadiz, was on the high seas in the latter part of March 1813, unlawfully, and in violation of the law of nations, and of treaties, captured by L'Invincible, before her capture by the Mutine, and carried to places unknown to the claimants, whereby the same ship Mount Hope and cargo, became wholly lost to the owners; and thereupon, praying among other things, that after payment of salvage, the residue of said ship L'Invincible and cargo, might be condemned and sold for the payment of the damages sustained by the said claimants, by reason of the premises.

At the same term, by agreement of the parties, an interlocutory decree of condemnation to the captors, passed against said ship L'Invincible, and she was ordered to be sold; and one moiety of the proceeds after deducting expenses, was ordered to be paid to the captors as salvage, and the other moiety to be brought into court, to abide the final decision of the respective claims of the French consul and Messrs. Hill and M'Cobb. The sale was accordingly made, and a moiety of the net proceeds amounting to five thousand four hundred and thirty-four dollars fifty cents, delivered to the libellants, and the remaining moiety delivered on stipulation to the proctor, for the owners of L'Invincible. The cause was then continued for a further hearing, unto September term 1813, when Messrs. Maisoncrara and Deruet of Bayonne, owners of L'Invincible, appeared, by their proctor, under protest, in answer to the libel and claim of Messrs. Hill and M'Cobb; and alleged among other things, that the ship Mount Hope, was lawfully captured by said ship L'Invincible, on account of having a British license on board, and of other suspicious circumstances, inducing a belief of British interests, and ordered for Bayonne for adjudication; that (as the protestants believed) on the voyage to Bayonne, the Mount Hope was recaptured by a British cruiser, sent into some port in Great Britain, and there finally restored by the admiralty to the owners, after which restoration she pursued her voyage, and safely arrived with her cargo at Cadiz; and the protestants thereupon pray, that the claim of Messrs. Hill and M'Cobb, may be dismissed.

The replication of Messrs. Hill and M'Cobb, among other

things, denies the legality of the capture, and the having of a British license on board the Mount Hope, and alleges embezzlement and plunderage by the crew of the ship L'Invincible, upon the capture of the Mount Hope; admits the recapture by a British cruiser and restoration by the admiralty upon payment of expenses; which, together with outfits for the voyage to Cadiz, amounted to nine thousand dollars; and prays that the protestants may be directed to appear absolutely, and without protest. Upon these allegations, the District Court overruled the objections to the jurisdiction of the court, and obliged the owners of the ship L'Invincible, to appear absolutely, and without protest; and thereupon, the said owners appeared absolutely, and alleged the same matters in defence, which were stated in their answer under protest, and prayed the court to assign the said Hill and M'Cobb, to answer interrogatories touching the premises, which was ordered by the court. Accordingly, M'Cobb and Hill made answers to the interrogatories proposed, except an interrogatory which required a disclosure of the facts, whether there was a British license on board? which M'Cobb (who was master of the Mount Hope, at the time of her capture) declined answering, upon the ground, that he was not compelled to answer any question, the answer to which would subject him to any penalty, forfeiture or punishment; and this refusal the District Court, on application, allowed. Hill, in answer to the same interrogatory, denied any knowledge of the existence of a British license. The cause was thereupon heard upon the allegations and evidence of the parties, and the District Court decreed, that Messrs. Hill and M'Cobb should recover against the owners of the Invincible, the sum of nine thousand dollars, damage and costs of the prosecution. From this decree the owners appealed to this court; and the preliminary question as to the jurisdiction of the court has been ably argued, and is now to be decided.

It is contended on the part of the protestants, that the prize courts of the United States, have no cognizance of captures made by a foreign power; but that the right to decide upon the legality, belongs exclusively to the courts of the capturing power. On the other hand, it is contended by the counsel of Messrs. Hill and M'Cobb, that although the general principle be admitted, that the courts of the capturing power have exclusive

jurisdiction as to the legality of all captures made under its authority, yet the principle applies only when the captured is actually brought within the jurisdiction of the capturing power, so that prize proceedings may attach upon it. That the admiralty courts of every country, have general jurisdiction in all cases of torts committed on the high seas, whenever the person or thing by whom the tort is committed, is within the territory. That in the present case, the ship *Mount Hope*, never having been carried into France, the jurisdiction of its courts never attached; and therefore, the present question as to damages, could never attach as an incident to the general jurisdiction of such courts.

The general doctrine, that the trial of prizes belongs exclusively to the courts of that state to whom the captor belongs, is now too firmly settled to admit of doubt. In the great arguments respecting the Silesia Loan, it is laid down in emphatic terms, that "this is the clear law of nations; and by this method prizes have always been determined in every other maritime country of Europe, as well as England." *Coll. Jurid.* This right attaches not only where the captured property is brought within the territory of the capturing power, but also where it is brought within a neutral territory. The seizure as prize, vests the possession in the sovereign of the captors, and subjects the property to the jurisdiction of his courts; and that possession is deemed firm and secure in a neutral port, and cannot be lawfully divested by a neutral tribunal. *Bynk. 2 P. I. ch. 15 and 17. Heinec. De Nav. ob vect. merc. vet. com. ch. 2 § 9. Hudson v. Guestier, 4 Cranch 293. The Henrick and Maria, 4 Rob. 43.* It makes no difference, whether the captured property in such case belongs to an enemy or a neutral. *Valin, traité des prises ch. 14 § 42, Duke of Newcastle's letter, Coll. Jurid. U. S. vs. Peters, 3 Dall. 121. Hudson v. Guestier, 4 Cranch 293.* It would seem, therefore, to follow as a necessary inference, that the courts of neutral nations were bound to abstain from the exercise of all jurisdiction over property captured as prize, by a regularly commissioned foreign cruiser, and brought into their ports. But, inasmuch as captures may have been made without a lawful commission, or fraudulently, or piratically, or in violation of the territorial rights of the country into which the prize property is brought, for the purpose of enquiries of this

kind, neutral courts may entertain jurisdiction, and in proper cases, award restitution. It seems settled, that if a capture has been made within the territorial seas of a neutral country, or by a privateer, illegally equipped in a neutral country, or by persons who could not, without a violation of their allegiance to a neutral country act under a belligerent commission, such a capture is invalid, and the property, to whomsoever belonging, may be rightfully restored by the prize courts of such neutral country, when brought within its ports. *Talbot v. Janson*, 3 Dall. 133. The principle upon which such decisions are sustained, seems perfectly sound and consistent with the acknowledged rights of belligerent powers. A neutral nation is bound to abstain from every act of hostility, and to conduct itself with perfect impartiality. If it suffers its neutral arm to be used, to aid one belligerent, and to oppress its own friends, it becomes a party to the war, and is justly responsible for every act of injustice or hostility, which flows from such conduct. It has a right therefore, to protect its own sovereignty from violation, and to punish the offenders; and as far as it is in its power, to restore the parties injured by the illegal act, to the same situation in which they were, before it was committed. So far then, as the sovereignty and rights of neutral nations are concerned, they form an exception to the general doctrine, as to the exclusive jurisdiction of the courts of the capturing power over prizes. The exception seems, indeed, to have been pressed somewhat further in some decisions in our own country; farther indeed, than in my humble judgment, and I speak with the utmost deference, can be easily reconciled with general principles. It seems to have been held, that wherever neutral or American property is captured on the high seas, by a lawfully commissioned ship of a foreign belligerent, and brought into our ports, the courts of the United States have jurisdiction to enquire into the merits of the capture; and if in their judgment, the captors are not entitled to a condemnation, to award restitution, notwithstanding even a probable cause for the capture. *Glass v. The Sloop Betsey*, 3 Dall. 6. *Del. Col. v. Arnold*, 3 Dall. 333. In time of war, it is an unquestionable right of the belligerent to search neutral ships and cargoes upon the ocean, and in cases of suspicion, to carry them in for adjudication. The evidence to acquit or condemn, comes in the first instance, from the ship's

papers, and the persons on board. If a breach of neutrality or fraud, or gross misconduct appears, the courts of prize are competent in such cases, to decree confiscation of the property by way of penalty. If, therefore, a neutral tribunal shall undertake to try these questions which regularly belong to the court of the belligerent, there is certainly some danger that the case will not always be tried by the same proceedings and rules, which ordinarily govern in prize causes. In cases of capture of enemy's property, strictly so called, under like circumstances, the exercise of such a jurisdiction would be utterly inconsistent with the admitted exclusive right of the captors; for no neutral country can interpose to wrest from a belligerent, prizes lawfully taken. 1 *Rob.* 65. *The Santa Cruz*. As all neutral property when captured, is, if condemned, deemed *quasi* enemy's property, the neutral tribunal does in fact, undertake to decide on the title to the captured property and settle its hostile or innocent character. If the property turn out to be hostile, it will not undertake to condemn it, for that would be a voluntary interposition in the war; if neutral, it seems difficult to conceive how it can rightfully settle the question, how far its character of neutrality has been compromised or injuriously used against the belligerents. It is true, that by the ordinance of Louis 14, *Des Prizes*, art. 15. it is expressly declared, that if on board of prizes, brought into French ports by foreign armed vessels, there shall be found goods belonging to the subjects of France, or its allies, the goods so belonging to *French subjects*, shall be restored. *Valin* says, that this right is exercised in favour of subjects by way of compensation for the asylum granted to the captor and his prize; but he expressly states, that the rule does not extend to the goods of allies. 2 *Valin Comm.* 274. *Valin Traité des prises*, ch. 7. p. 106. At best, this is but a mere municipal regulation of France; and in countries where no similar regulation exists, it should seem fit that the general rule of the law of nations should prevail. The true principle seems laid down by judge Johnson, in his very able opinion in *Rose v. Himely*, 1 *Hall* 11. 4 *Cranch*, appendix. Note (C). "A prize brought into our ports by a belligerent continues subject to the jurisdiction of the capturing power, although the corpus be within the limits of another jurisdiction. A prize brought into our ports, would be in no wise subjected by that circumstance to our jurisdiction, except perhaps, in the

single case of its being necessary to assume the jurisdiction to protect our neutrality or sovereignty; as in the case of capture within our jurisdictional limits, or by vessels fitted out in our ports." In the *Flad oyen*, 1 Rob. 134, 146. Sir William Scott asserts the same doctrine, and declares, that prize of war is a matter over which "a neutral country has no cognizance whatsoever, except in the single case of an infringement of its own territory." The doctrine which seems asserted in the cases of *Glass v. the Betsey*, and *Del. Col. v. Arnold*, so far as applies to the present discussion, is encountered also, and in no small degree shaken by the opinion of the supreme court in *Hudson v. Guestier*, 4 Cranch, 293. 1 Hall 5. The chief justice, in delivering the opinion of the court, speaking of a vessel captured as prize, says, "In the port of a neutral she is in a place of safety, and the possession of the captor cannot be lawfully divested, because the neutral sovereign by himself, or his courts, can take no cognizance of the question of prize or no prize. In such case, the neutral sovereign cannot wrest from the possession of the captor, a prize of war, brought into his ports." Applying the same reasoning to the case of a seizure for the violation of a municipal law, he declares it to be the opinion of the court, "that a possession thus lawfully acquired under the authority of a sovereign state, could not be divested by the tribunals of that country into whose ports the captured vessel was brought. It will be recollected, that in this case the property belonged to American citizens, and had been condemned while lying in a Spanish port, by a French tribunal, and afterwards brought to this country. But in *Rose v. Himely*, 4 Cranch, 241, which was argued at the same time, and involved in many respects, the same questions as *Hudson v. Guestier*, the property was actually brought into the United States, and libelled for restitution, before any proceedings were instituted in any French tribunal. The doctrine, therefore, in *Hudson v. Guestier*, must be supposed to apply to the case of American, as well as neutral property, captured and brought into an American port. In either respect, it would be inconsistent with that which seems to be assumed in the cases in 3 Dallas, to which I have alluded.

But, allowing these cases to have the fullest effect, which the most liberal construction can impute to them, they only decide

that the jurisdiction of our courts, in matters of prize, made by foreign cruisers, attaches whenever the prize property is within our own ports. In the case before the court, the cruiser itself only is within the country, and not the captured ship in the character of prize. It is therefore clearly distinguishable. The cruiser too, comes into port by compulsion, in the hands of American recaptors, succeeding to enemy captors. It is not, therefore, a case, where even a voluntary asylum is sought. I accede to the position, that in general, in cases of maritime torts, courts of admiralty will sustain jurisdiction, where either the person or his property is within the territory. It is not even confined to the mere offending things; it spreads its arms over the tangible as well as incorporeal property of the offending party, to enable it to afford an adequate remedy. The admiralty may, therefore, arrest the person, or the property, or by a foreign attachment, the *choses* in action of the offending party, to answer *ex delicto*. But it affords such remedies only, where the tort is a mere maritime trespass, and not where it involves directly the question of prize. No case has been produced at the argument, where a neutral tribunal has sustained jurisdiction, *over a cruiser*, on account of her having made illegal prizes on the high seas, where the prize was not within its territory. After considerable research, I have not been able to find any such case in modern times. From the works of sir Leoline Jenkins, (2 *Vol.* 714, 754) it does however appear, that in 1675, the English admiralty confiscated a French privateer, on account of illegal depredations committed on English and Dutch vessels, against the remonstrances of the French government, who claimed a *renvoy* of the cause as rightfully belonging to them. But the particular ground of the decision does not appear; and as one charge was for an infringement of the territory of Great Britain, it might have turned upon that point. 2 *Woodes.* 425.

On the other hand, in the case of the *United States vs. Richard Peters*, 3 *Dall.* 121. the supreme court awarded a prohibition to the district court, against proceeding on a libel against a French national ship of war, for an alleged illegal capture of an American schooner and cargo, the prize having been carried into a French port for adjudication. The prohibition asserted, that by the law of nations, belligerent cruisers, duly commission-

ed, have a right in time of war, to arrest, and seize neutral ships, and carry the same into the ports of their sovereign for adjudication; and that such cruisers, or their officers and crew, were not amenable before the tribunals of neutral powers, for their conduct therein. It is argued, that this case is inapplicable to that at bar, because the *Mount Hope* was recaptured, and thereby the right of the French captors divested, and their courts ousted of jurisdiction. It is certainly law, that in case of a recapture, escape, or voluntary discharge, of a captured vessel, the right of the courts of the belligerent to adjudicate upon the property as prize, is completely gone; for that right remains only, while the possession of the property remains either actually, or constructively, in the sovereign of the captors. But it does not follow, that such courts are deprived of the authority to award damages to the injured party where the capture has been unlawful, and thereby indirectly, to entertain the question of prize. Much less is it to be inferred, that the fact of recapture alone, enables a neutral tribunal to take cognizance of the capture itself, and try the question of prize, over which originally, it could not assert any jurisdiction. In the first place, it is extremely clear, that the French courts have complete authority, as courts of prize, to award damages for the capture, if it were illegal, of the *Mount Hope*. The ordinary mode of seeking redress by neutrals, for such injuries, is, to apply to the prize tribunals of the sovereign, under whose authority the capture has been made, for damages. Such cases are familiar in the annals of the admiralty. *The Betsey*, 1 Rob. 93. The argument therefore of the counsel for *Hill and McCobb*, that if this court has no jurisdiction to award damages, no court has, and there is a right without a remedy, cannot be sustained. In the next place, the principal question involved in a trial under such circumstances, necessarily is the question of prize. It is true, that probable cause would justify the seizure, and destroy the claim for damages; but it must be probable cause to seize as prize, in reference to a violation of belligerent rights. What constitutes such a probable cause, depends on the state of the war; the actual operation of the belligerents; the documents required to be on board; the artificial rules applied by prize tribunals, to sift the colourable papers and commerce of neutrals; and the positive directions of the sovereign power. Of some of these questions

at least, the courts of the captors are the most competent judges. Suppose an American ship had been captured under the British orders in council for having a certificate of origin, would it have been competent for an American tribunal, if the cruiser had come within our ports, to have decided upon the legality of the capture thus made, under the orders of the sovereign, who had already declared such certificate to be a good cause of condemnation? It seems to me difficult to maintain, that such a capture so made, could, in an American court, subject the party to damages, even supposing it to be a clear infringement of our neutral rights and of the law of nations. The acts done under the authority of one sovereign, can never be subject to the revision of the tribunals of another sovereign; and the parties to such acts are not responsible therefore, in their private capacities. If the citizens of a neutral country are injured by such acts, it belongs to their own government to apply for redress, and not for judicial tribunals to administer it. One great object in the establishment of prize courts is, to ascertain whether a capture is made under the authority of the sovereign power. When once the courts of any sovereign have definitively pronounced the capture rightful, it becomes the acknowledged act of the sovereign himself; and the parties who made the capture, are completely, as to all foreign nations, justified, however repugnant such capture may seem to the law of nations. How can a neutral tribunal decide, that a capture on the high seas is in opposition to the will of the sovereign of the captors? It may perhaps, be competent to decide, that it ought not to have been ratified; but could it hence infer that it would not be? Whether damages then, shall, in any case of capture, be given, must depend upon the law of prize, as understood and administered by the foreign sovereign, or in a case of probable cause upon the subsequent conduct of the captors. The damages therefore, are not an independent or principal enquiry, but the regular incident to the question of prize, in whatever manner process may be instituted. This consideration disposes of that part of the argument, in which it is assumed, that although a neutral tribunal may not directly entertain the question of prize, yet it may collaterally, when it is a mere incident to the question of damages. On the whole, I am of opinion, that in the case before the court, the prize tribunals of France had complete jurisdiction of the cap-

ture; and that, although the right to adjudicate as prize, was de-vested by the subsequent British recapture, yet it was still competent for them to entertain a suit against the owners for damages, if the capture were illegal: that consistently with the law of nations, an American tribunal could not adjudge on the question of prize; and the recapture of the prize, or the bringing the cruiser within our ports, did not vest a jurisdiction in such tribunal, which it was otherwise incapable of assuming. I am therefore, for sustaining the plea to the jurisdiction, and for dismissing the claim of *Hill and McCobb*, with costs.

DAVIS, *District Judge*, concurred.

Claim dismissed with costs.

G. Blake, for Apt.—Dexter, for Appellees.

On appeal to the supreme court of the United States, this decree was unanimously AFFIRMED, at the February term, 1816.

CIRCUIT COURT, U. S.—MASSACHUSETTS.

The SARATOGA.—Keating, Claimant.

October, 1814.

[Of the effect of capture and detention, upon the contract between master and seamen, whether the latter are bound to wait a first adjudication—The seamen's wages are lost when the voyage is defeated and no freight earned. The seamen, having been employed by the master to refit the vessel in a foreign port, were allowed a part of their wages for the time they were so employed, although the voyage was lost. The seamen having been discharged in a foreign port, and the two months' wages, directed in that case to be paid to the consul, for their use, not having been paid, a libel was sustained for the same here.]

THE libellants shipped, as mariners, on board the ship *Saratoga*, on a voyage from Boston for Amelia Island, at and from thence to a port or ports in Europe; and at and from thence to her port of discharge in the United States. The ship sailed from Boston in October 1811, for St. Mary's, where she took in a cargo, and from thence proceeded to Portsmouth, in England, where her cargo was discharged. The agents of the owners having engaged a cargo on freight, at Londonderry in Ireland, for the United States, the ship sailed in ballast for that port, on the 23d of April 1812, and on the 26th of the same month, was captured by the French privateer *Espadon*, and carried into Roscoff in France, for adjudication. Prize proceedings were there instituted against the ship, and her hatches sealed, and all the crew, except the mates, who were permitted to remain on board, were sent to Morlaix, as prisoners. In August 1812, the captain came down from Morlaix with all the crew, excepting three, and by permission they were there employed fifteen days in tarring the rigging, and other ship's duty, and at the end of that time the crew returned to Morlaix. The ship was restored to the captain by order of the court, and taken possession of by him, on or about the first of January 1813. On the 4th of the

same month, the crew came on board and went to work, graving and painting the ship; and on the 7th of the ensuing February, the ship sailed for Morlaix, and arrived in the roads there on the same day; but did not get up to the town until the first of March following. The crew remained and slept on board until about the middle of July, in the same year, doing duty as required by the officers, and then left the ship, with the consent of the captain and the American consul, and sailed in a cartel for the United States. During the time of detention under the prize proceedings, the crew were principally maintained by the French government, and the expense, at the restitution, was made a charge on the ship. The crew, frequently during their residence in France, applied to the captain for their wages and discharge. The captain as often told them, that they might go where they pleased, but he had no money to pay them their wages, and they might, if they pleased, arrest the ship, and he would not oppose them. But they did not choose to leave the ship without payment of their wages, and the captain, from time to time, permitted them to go on shore and work, whenever they could get employment. He seemed, however, to have exercised his control over them, and declared, that if they worked on board of the cartel, before their discharge, their wages would be forfeited.

After the discharge of the crew, the *Saratoga* was finally made a cartel, to carry prisoners to England at a stipulated price; and from England she came with prisoners to the United States, where she arrived on or about the second of September, 1813. For this last voyage, no compensation had as yet been received.

The libellants had been paid their full wages up to the time of the ship's departure from Portsmouth; and now claimed wages from that time to the time of their discharge in France; and, in addition, the two months pay provided by statute of the 28th of February 1803, ch. 62, sect. 3, in cases of the discharge of seamen in foreign ports.

STORY, J. (after reciting the facts.) The question for the consideration of the court is, whether the libellants are entitled, under all the circumstances of the case, to any wages beyond what they have already received; and if so entitled, for what period wages are to be allowed.

It is argued, on behalf of the respondents, that the libellants have no farther claim for wages, no freight having been earned, and the voyage having been, by the capture and subsequent declaration of war between Great Britain and the United States, completely broken up and defeated.

The general rule is often asserted, that to entitle the seamen to wages, freight should be earned on the specific voyage for which they engage; and that if, by any disaster happening in the course of the voyage, the owners lose their freight, the seamen also lose their wages. (a) The reason or policy of the rule is alleged, in *1 Siderfin* 179, to be, that if in case of the loss of the ship by tempest, enemies, &c. the mariners were to receive their wages, they would not hazard their lives for the safety of the ship. The rule itself also is not without exceptions; if the voyage or freight be lost by the negligence, fraud or misconduct of the owner or master, or voluntarily abandoned by them; if the owner have contracted for freight upon terms or contingencies differing from the general rules of maritime law; or if he have chartered his ship to take a freight at a foreign port, and none is to be earned on the outward voyage; in all these cases the mariners are entitled to wages, notwithstanding no freight has accrued. (b) Reasonable, however, as the rule may seem to be, under these limitations, to those who are conversant with the maritime law of England, it does not seem to have obtained the universal sanction of the commercial world, though it has the weight of the authority of *Bynkershoek* (c) to support it. *Roccus* (d) holds, that wages are due, notwithstanding the voyage is not performed, if it happen from any fortuitous occurrence, and the mariner is not in fault. *Cleirac* seems silently to adopt the regulations of the ordinance of Philip 2d, as reasonable, (e) and *Pothier* considers that maritime contracts, subject to few exceptions connected with the French ordinances, are governed by the same principles as other contracts of hire, and

(a) *Abbot on Shipping*, p. iv. ch. 3, § 1. *Hoyt v. Wildfire*, 3 John. R. 518. *Dunnett v. Tomhagen*, 3 John. R. 154.

(b) *Hoyt v. Wildfire*, 3 John. R. 518. *Hindman v. Shaw*, *Peters' R.* 264. *Brig Cynthia*, *Peters' R.* 203. *Peters' R.* 136, note. *Abbot*, p. iv. ch. 2, § 5. *Malynes*, 105. *Molloy*, book 2, ch. 3, § 7. *Moran v. Bandin*, *Peters' R.* 415. *Roccus de Nav.* n. 43.

(c) 2 P. J. ch. 13.

(d) *De Nav.* n. 43.

(e) *Cleirac*, *Judg. de Oleron*, Art. 19, § 3.

consequently that if, after its commencement, a voyage be defeated by accident, or superior force, the mariners are entitled *pro rata* for their term of service. (f)

It has been argued, that the capture put an end to the contract for wages; and, therefore, that no services, performed afterwards, can entitle the libellants to recover wages upon the footing of that contract. Admitting that capture, followed up by condemnation, would extinguish such a contract, still such effect cannot be attributed to a capture, where there has been a recapture or restitution. And notwithstanding some contrariety of opinion, it may be safely affirmed, that such capture operates, at most, but to suspend the contract; and that, by restitution or recapture, the parties are remitted to their former rights in the same manner, as if no such interruption had occurred. (g)

It has been further argued, that by the capture the relation between the owners and mariners ceases; so that the latter are not bound to remain by the ship, but are at liberty, without the imputation of desertion, to abandon the voyage. Without deciding, whether the rule assumed in some of our own courts be not more reasonable, that the mariners are bound to remain by the ship until a first adjudication (h) it is clear, that the mariner is not *bound* to leave the ship. He has a right to remain by her, and wait the event. If restored, he is entitled to his wages if the ship proceed and earn a freight; if condemned, he may lose his wages, though perhaps, under circumstances, with a recompense for his actual services, pending the prize proceedings. And this doctrine seems founded in the interests of all parties. It would, indeed, be highly injurious to commerce, to establish, that in every case of capture, upon whatever pretence, or however unfounded, the mariners were obliged immediately, without waiting the event, to quit the ship in a foreign port. It would often expose the owner to a loss of the voyage, from the difficulty of obtaining a new crew, or to extraordinary expense in securing his property. On the other hand, the mariners would be no less exposed to inconvenience. They might be turned

(f) Pothier, *Louage des Matelots*, 179, &c. 198—203. See also Abbot, p. iv. ch. 2, § 6.

(g) *Beale v. Thompson*—4 East R. 546—*Brooks v. Dow*, 3 Mass. H. 39.

(h) *Brig Elizabeth*, Peters' R. 128—and see *Lemon v. Walker*, 9 Mass. R. 404.

ashore, without money or credit, in a foreign country, against the manifest policy of our laws. It would seem fit, therefore, to hold, that a contract entered into by mutual consent, should not be dissolved unless by that consent, until such proceedings were had, as left no ordinary hope of recovery in the original tribunal of prize.

Upon the principles, then, which have been stated, the capture did not dissolve the contract for wages; at most, it was but suspended during the prize proceedings, the event of which the parties had a right to await, and by the subsequent restoration of the ship, the contract revived in its full force, and remitted the parties to their former character and rights. If the ship had then been in a condition to perform her voyage, and had actually performed it, there can be no doubt, that the mariners would have been entitled to their full wages during the whole time of service. (i)

But, at the time of the restoration of the ship, war existed between Great Britain and the United States; and the farther prosecution of the voyage was not only impracticable; but highly criminal in both parties. The legal effect, therefore, of such an interdiction of commerce was to absolve both parties from any farther performance of the contract. (k) The question then arises, whether a loss of the voyage, in consequence of an interdiction of commerce after its commencement, deprives the owner of his freight, or the mariners of their wages.

It seems to be a doctrine of our law, that if a voyage be broken up by an interdiction of commerce with the port of destination after its commencement, no freight is payable. And the same rule is applied to cases, where the voyage is lost by accident or superior force. (l) In short, the principle seems to be that there must be an actual delivery of the cargo at the port of destination, to entitle the party to his full freight. (m) If, indeed, there be a voluntary acceptance of the cargo at an inter-

(i) *Beale v. Thompson*—4 East R. 546.

(k) *Abbot* p. III. ch. 11—§ 3.—*Scott v. Libby*, 2 John. R. 336—*The Tutela*, 6 Rob. 177.

(l) *Osgood v. Groning*, 2 Camp. R. 466. *Liddard v. Lopes*, 10 East 526.—*Scott v. Libbey*, 2 John. R. 336. *Abbot* p. III. ch. 7, § 5. *Id.* ch. 11 § 3. *The Hiram*, 3 Rob. 189.

(m) *Richardson v. Maine Ins. Com.* 6 Mass. R. 102—118.

mediate port, and a dispensation of farther proceeding, then a *pro rata* freight is due. (n)

In these respects our law appears to differ from the maritime law of other countries. Roccus (o) declares, that if the ship has begun her voyage, and from accident is prevented from completing it, freight is payable for the part of the voyage actually performed. This also is the opinion of *Straccha* (p) and seems, with some distinctions, to be adopted in the maritime regulations of France. (q) Indeed, in the case of an interdiction of commerce after the voyage is begun, the full freight for the outward voyage is allowed. (r)

If we pass from the consideration of freight to that of wages, we shall find, as I have already stated, that foreign writers do not consider that wages are wholly lost, but recoverable *pro rata itineris*, where the voyage has been in part performed, and its further accomplishment has been prevented by inevitable casualty or superior force.

As to an interdiction of commerce with the port of destination, occurring in the voyage, *Cleirac*, (s) adopts with apparent approbation, as conformable to the civil law, the regulation of *Philip 2d*, that the mariners shall, in such case, receive a quarter part of the wages agreed upon for the whole voyage. (t) The French ordinance (u) declares, that, in the like case, the mariners shall be paid in proportion to the time they have been in service, and this *Pothier* says, is conformable with the general rules of the contract of hire. (x)

No case has been cited, in which this point has been settled in our own courts; and, as far as I have been able to ascertain, after a pretty diligent search, it yet remains for a decision in our maritime law. But if the doctrines, already settled in relation to freight, are to apply, and it seems impossible to dis-

(n) *Luke v. Lyde*, 2 Bun. 882. *Leddiard v. Lopez*, 10 East 526. *Osgood v. Groning*, 2 Camp. 466.

(o) *De Nav.* n. 54 n. 81.

(p) *De Nav.* part 3, sec. 24.

(q) *Pothier Charter Partie*, n. 68—69—1 *Emerig.* 544—1 *Valin Comm.* 656.

(r) *Emerig.* 544—1 *Valin Comm.* 656—*Pothier Charter Partie*, n. 69.

(s) *Jugemens d'Oleron*, art. 19. § 3, § 41.

(t) *Dig. lib.* 19. tit. 2. l. 15. § 5.

(u) *Des Loyers des Matelots*, art. 4.

(x) *Pothier, Louage des matelots*, 180. 1 *Valin. Comm.* 698.

tinguish them, the interdiction of commerce must be deemed to dissolve the contract, and leave the mariner without any title to wages *pro rata itineris peracti*. Indeed, the moment it is held, that, where freight by the general law is not earned, wages are not due, the case falls directly within the authorities, which have been already examined.

My opinion as to this point, therefore, is, that war existing at the time of the restoration of the ship, and the farther prosecution of the voyage being illegal, the original contract was completely dissolved, and up to that time no further wages were due. If the case had rested here, the claim for wages must have been repudiated.

But the mariners, with the consent of the master, came on board, and did duty from the time of the restoration of the ship, until their final discharge. It was clearly competent for the master to hire and employ a crew for the preservation and equipment of the ship, and the services so performed cannot, by any reasonable construction, be referred back to a contract, which then had no legal existence. The libellants then must be deemed to have gone on board, and to have done duty, under an implied contract to receive a reasonable recompense, in the nature of wages, *pro opere et labore*. Upon the footing of this new contract, I have no difficulty in sustaining their claim for wages, during the time of their connexion with the ship after restoration. Full wages, however, ought not to be given for this period, because the services performed or required were not equal to the usual services in the progress of the voyage. In case of a detention, under the arrest of a sovereign, the French ordinance (y) provides that the mariners hired by the month shall be entitled to a moiety only of their wages during such detention. Under all the circumstances of this case, I shall adopt this as an equitable rule, and shall decree wages accordingly.

The next question that arises, is, whether the libellants are entitled to the two months pay under the act of the 28th of February, 1803, ch. 62. The third section provides, that whenever an American ship shall be sold in a foreign country, or an American seaman shall, with his own consent, be discharged in

(y) Des loyers des matelots, Art. 5. Valin comm. 6, 190.

a foreign country, the master of the ship shall pay to the commercial agent of the United States, for every seaman so discharged, three months pay, over and above the wages due to such seaman, two-thirds thereof to be paid to such seaman on his engagement on board of any vessel to return to the United States, and the remaining third to be retained, for a fund to relieve destitute American seamen. I agree with the counsel for the respondents, that the cases here alluded to are cases of voluntary discharge, and not cases, where the discharge has resulted from inevitable necessity or superior force, such as a total loss by capture, tempest, or other fortuitous occurrence. But I can, by no means, admit, that the present case comes within the exception. The ship was in a capacity to return home, or perform any lawful voyage, and at the time of the discharge, the libellants were attached to her service. The case falls, therefore, within the words and the mischiefs of the statute, and though the money is required to be paid into the hands of a public agent for the use of the libellants, yet as they did all the acts, which gave them a perfect title to it, and it was not paid, this court will enforce their title directly against those, who were circuitously compellable to pay it. The two months wages, however, are to be calculated, not on the original wages, but on the wages growing out of the new contract of hire.

Before I close this opinion, I will advert to one or two considerations, which have been thrown out in the argument. It has been argued, that if the seamen were entitled to wages, they were bound to contribute towards the expenses of procuring the release of the ship, as a general average. But I know of no rule of law, which subjects the seamen to contribution in such a case. The general doctrine is, that they do not contribute to general average. The only admitted exception is, in case of ransom, and, perhaps, by parity of reasoning, of recapture. (z) If the doctrine were otherwise, it would not apply to the present case, for the wages to contribute must be those, which are saved by the expenses incurred; and not by the wages accruing under another contract. Here the very subject matter for contribution was totally lost.

(z) Abbot, p. III. ch. 8, § 14. Id. p. IV. ch. 3, § 2. The Friends, 4 Rob. 143—1 Emer. 642. 1 Valin. Comm. 752, 701.

captain's adventure, and an adventure by Archer Fairfield, the amount of which does not appear.

A supercargo, or assistant, as he is called in the orders, was on board, and the master was instructed to advise with him, "in every part of the transactions of the voyage." The ship sailed from Salem 2d August, 1809; and after touching at Cagliari, proceeded to Naples, where she arrived 13th Sept. 1809; the master and supercargo having inferred, from information received at Cagliari, that they might go to Naples with safety. The ship was immediately put under quarantine. On the 21st Sept. while under quarantine, the unloading commenced by the master's order, and was continued until the 25th. The goods unladen were taken to the custom-house stores. On the 25th, the master, having heard a report that his ship and cargo were under sequestration, stopped the unloading of the cargo; but the officers of the customs required him to send ashore what was then laden into boats, and urged him to discharge the residue. This the master refused to do, suggesting the necessity of retaining what remained on board as ballast, and as a necessary security for the ship. Orders to complete the unloading of the cargo were frequently repeated, and insisted on as a condition of the master's receiving the *pratique*, which is understood to be a certificate of conformity to the quarantine regulations. This document was received for the ship, 13th Oct. after the quarantine had continued one month, and for the goods, one month afterwards, Nov. 13th. On the 10th Nov. the whole residue of the cargo was discharged, by peremptory orders from the officers of the customs, which the master could no longer evade. The evidence produced, gives no further account of the property until 4th Jan. 1810, when the cargo was advertised for sale, and was sold accordingly at public auction on the next day, "on account of the royal treasury." On the 3d Jan. certain officers of the Neapolitan government, entered on board the ship, unhung the rudder, took an inventory of the provisions and furniture, and sealed the hatches, leaving express orders, that they should not be opened without permission from the custom-house. On the 12th March 1810, was published a decree of JOACHIM NAPOLEON, king of the Two Sicilies, confiscating thirty American vessels, of which the *Hercules* was one, "in conformity to orders given from Paris," 2d Dec. 1809. Such of

the cargoes of these vessels as had not been sold, as well as the ships, were directed to be disposed of at public or private sale, as should be judged most conducive to the royal interests; and the proceeds of the sales were ordered to be deposited in bank, to be employed as the king should judge to be *convenient*.

Notwithstanding these proceedings, the master of the *Hercules* was not dispossessed of his ship, but the crew lived on board, on the ship's provisions. The confiscated ships were necessarily sold, as suited the views and convenience of the government, and captain West was in constant expectation of a similar fate. In June 1810, he made an arrangement with a merchant at Naples, (Mr. Broadbent) for assistance in the purchase of the ship at the appraised value, and to perform a voyage with her to Sicily on that gentleman's account. While this project was in train, viz. 16th June 1810, a written contract was entered into between captain West and his crew, including the libellants, by which they engaged to remain on board under his orders until he should be deprived of his command, or the ship should commence loading, in consideration of a small daily allowance for their support, and to proceed on whatever voyage should be proposed, at the monthly wages expressed in the contract. Before the contemplated arrangement with Mr. Broadbent was definitively settled, proposals were made to captain West by an officer of high rank, to proceed with the ship to Civita Vecchia, and there take in freight for Philadelphia. For this service an offer was made to give him the ship and papers, to repay the expenses of unlading the cargo, and to satisfy Mr. Broadbent relative to the contract. These overtures were readily embraced, and on the 4th July, the contract between the master and crew, on which the second count in the libel is founded, was concluded. It is for a voyage from Naples to Civita Vecchia and thence to the United States, and is signed by all the libellants.

The ship sailed for Civita Vecchia soon afterwards with convoy, and arrived there 21st July. The precise object of the voyage was not understood by the master until his arrival at that place. He then found that he was to take LUCIEN BONAPARTE, with his family and effects, to Philadelphia.

On the 8th August, he sailed for Philadelphia with the reight furnished by Lucien Bonaparte, who, with his family

and suite, were passengers on board. For this service two thousand dollars were paid in advance, and eight thousand dollars were, by agreement, to be paid on arrival at Philadelphia. Twelve days afterwards, the ship was captured by a British frigate and sent to Malta. The passengers and their property were taken out, but the ship was liberated on paying a proportion of freight *pro rata*, the amount of which is not stated. On the 10th of November last, the ship sailed from Malta, and arrived at Salem on the 5th of February, having touched at Gibraltar on the way, and there delivered a quantity of cotton, taken in at Malta.

On these facts it is contended for the respondent,

1st. That no freight was earned on the voyage from Salem to Naples, and that therefore the wages for that period are lost.

2d. That the confiscation of the ship dissolved the first contract, and extinguished all claim for wages under it, if no freight was earned. After that event, it is contended, there existed no legal connexion between the mariners and the ship; and that their subsequent relation to the ship depends altogether on the new contracts entered into at Naples, in June and July, 1810.

In this voyage, though not so entirely disastrous as many others from the United States to the same port, there was still a heavy loss. In determining on the operation of these adverse incidents, I am solicitous to form a correct decision, and to place to the account of each the just portion of the misfortune according to principles of law. In the present state of the world, and in the peculiar situation of American commerce, cases not unfrequently occur dissimilar in material circumstances, to any which we find previously decided. We must refer to general principles, and from their application and by cautious analogies from previous determinations, declare the result; adjusting, by equitable considerations, what positive authority has not decisively settled. In deliberating on cases of this description, the indignant feelings excited by a view of the severe execution of the *Continental System* on our enterprising and unoffending countrymen, ought not, perhaps, in this place, to be fully expressed. I cannot forbear, however, to remark on one feature of the transaction which perplexes the investigation and augments the difficulty of making a correct decision between the parties: I mean the denial of papers or documents illustrating the pro-

ceedings against the vessel and cargo, by which, if produced, the nature and grounds of such proceedings would be seen and understood, and their legal operation in regard to collateral questions satisfactorily determined. No such documents are exhibited, excepting a newspaper copy of the decree of 12th March 1810; and it is testified by reputable witnesses, fellow-sufferers with captain West, that they could not be procured. There might have been left no alternative to the injurious authors of those acts of outrage, but to choose between silence and sophistry. Still, such a departure from the laudable course of civilized nations in proceedings against foreigners and their property, should be reprobated in every region where truth may yet be expressed and justice find an advocate.

This case is clear of all exceptions to the conduct of the seamen. They performed their duty faithfully, adhered to the ship in all the difficulties attending the voyage, and brought her home in safety to the owner. Have the difficulties occurring in the voyage, extinguished their claim, in whole or in part, to the wages promised in the first shipping paper executed at Salem?

The general dependence of wages, on the earning of freight, is admitted; but I am not satisfied that freight should not be considered as earned under the circumstances of this voyage:

If the ownership of the vessel and cargo had been in different persons, the question of freight could be considered more distinctly and to better advantage; for an actual contract would have existed in such case. Here the respondent must be viewed as owner of both vessel and cargo. The adventures of Fairfield and of the master, are too inconsiderable to make any difference applicable to the points under consideration, no express contract relative to freight exists, but the union of interests which precludes the necessity of such a contract, does not destroy the connexion between freight and wages, and we may properly contemplate the subject as if the ship had actually received goods on board, the property of other persons to be transported on freight, or as if the vessel had been chartered for the voyage specified.

In such a view of the transaction we ought to consider the contract for freight to be a reasonable one, and to be made with all due precautions, having regard to the nature of the voyage, and the peculiar perils attending the destination of the ship.

Now, it appears, that a voyage to Naples, or to any other place under French control, was not originally contemplated. By orders prepared previously to those under which the ship was ultimately dispatched, the voyage marked out is to Algiers, Tunis, Cagliari, or "some other neutral or privileged port." When the final orders were given, and a voyage to Naples was authorised, it was evidently under great apprehensions. With those views of a voyage to Naples, if the owner of the ship at the time those orders were penned, had shipped no property of his own, but had merely chartered his ship or taken on board property on freight for that destination, it must be presumed, that a prudent regard to his own interest, would have suggested such an adjustment of the contract, as to encounter only the risk of transportation, and would have left the earnings of his ship dependent on the safety of the property, after her arrival at Naples. If, from tempting offers of high freight, or from any interest in the profits of the adventure he should be induced, under such circumstances, to make the reception of freight dependent on the safety of the property after its arrival at the place of destination, yet such a contract would not, in my opinion, create a similar dependence of the seamen's wages on the freight, unless it were distinctly stated to them, and the terms of their shipment should have expressed such a condition.

After a deliberate consideration of this contract, and its incidents, it is my opinion, that the claim of the libellants on the outward voyage, is not defeated by the circumstances which have been stated: nor do I conceive it necessary for authorising this conclusion to resort to the guarded contract relative to freight, which I have supposed the nature of the voyage would reasonably impose on the ship owner. The ordinary contract of freight without any special provisions would, I apprehend, secure freight to the owner of this ship, or, at any rate, sufficient for the payment of wages on the outward voyage.

In case of a vessel let to freight, and the object of the voyage being defeated by prohibitions, in the country or place to which the vessel is destined, the *Consolato del Mare* makes the earning of freight dependent on the knowledge of the parties; if both the owner of the ship and of the goods are informed of the existence of impediments, but still are disposed to encounter the risk, the freight is not payable in case the voyage be interrupt-

ed. If the owner of the goods be thus informed, but the owner of the ship is ignorant, freight is payable. If the voyage be commenced, and neither the ship owner nor the proprietor of the goods on board, have any knowledge or expectation of impediment from the sovereignty of the country to which the ship is destined, the *Consolato* decides, that in such case freight is not payable; because, as it is observed, it is not the fault of the merchant that the act of sovereignty intervenes to obstruct the voyage. The course of modern authorities is opposed to the rule of the *Consolato* in regard to the last supposed instance of *vis major* defeating the object of the voyage. *Morgan vs. Ins. Co. North America*, 4 Dall. 455. is a case of this description. There, the vessel arrived at Surinam, the place of her destination, and being prohibited from entering, she returned to Philadelphia with the cargo. The court (Tilghman, Ch. J.) considered the freight as earned, and that the obtaining permission to land the cargo was the business of the consignee. So also in *Blight vs. Page*, cited in 3 Bos. and Pull. 295. where the ship was prevented from taking in a cargo of barley at a port in Russia, in consequence of an unexpected prohibition from the Russian government, a sum in damages, was given to the ship owner against the charterer, equivalent to the stipulated freight. The principles which govern those cases, would go far, I think, to produce a correspondent determination in that which is now under consideration. But I do not think it necessary to declare an opinion, as to that part of the cargo of the *Hercules*, which was landed by constraint. In expressing a conviction, that there was a sufficient quantity unladen free from exceptions as to freight, I had reference to that portion of the cargo which was landed between the 21st and 25th of Sept. In the protest of the master, made at Naples, 11th June 1810, he states, that he arrived on the 13th Nov. 1809, and was put under quarantine; but that his cargo was freely admitted, and was begun to be discharged on the 21st of that month; that upon the 25th, he was informed, that his ship and cargo were put under sequestration, upon which he refused to discharge any more, but that the officers of the customs obliged him to do it. We may, as to this suit, lay out of the case, all considerations in regard to that portion of the cargo which was discharged by *constraint*, after the master had received information which excited alarming

apprehensions, and confine our views to that part which was discharged *voluntarily*. The precise amount is not stated, but from the time employed and the nature of the cargo, I consider it warrantable to presume, that it was sufficient to produce freight adequate to the payment of the wages, if freight were earned. In regard to that portion of the cargo, (however it may be with the residue) in my opinion, freight must be considered as earned: and if by fire, or any other calamity, those goods thus landed, had been destroyed immediately after their landing, it would not have affected the claim to freight. The ship, under such circumstances, must be considered as *munere vehendi functus*, and as having performed the service implied in the contract for transportation of the goods. The subsequent misfortunes attending the property after a voluntary landing, by the direction of the person intrusted with it, must attach altogether and exclusively to the owner or underwriter, unless the specialty of the contract should involve the ship owner in a participation of the loss.

In regard to any subsequent wages, we must look to the fate of the ship, and consider the effect of the royal decree of confiscation.

It is contended by the counsel for the libellants, that the subsequent restoration, especially as there had been no sale of the ship, constitutes a resemblance, in legal operation, between this case and cases of capture and recapture, or of temporary detention by embargo which do not defeat a claim for wages, unless there be fault on the part of the mariners according to repeated decisions both in our state and national courts.

Though not informed of the grounds of the condemnation, I consider the decree against the ship as precluding any demand for wages beyond its date, excepting on the new contract, made after that event.

The freight supposed to be earned, establishes the claim for wages, at the rate of the original contract on the outward voyage. I award wages to the mariners at the same rate for the interval between the landing of the cargo and the condemnation, in accordance with a reasonable rule adopted by Judge Peters. *Adm. Dec. 130*. The seamen not having been discharged, and not being at liberty to leave the ship until her condemnation, without consent of the master, are entitled to compensation du-

ring that interval; and I consider the wages stipulated in the shipping paper to be, in this case, the proper measure of that compensation.

The contract of 4th July 1810, which was fairly entered into in reasonable conformity to the existing circumstances, must regulate the claim for wages on the homeward voyage.

The subsistence and allowance afforded to the mariners between the condemnation and the new contract, are viewed as a satisfaction of their claims during that interval.

On these principles and considerations, I decree the following sums, with costs, &c. to the libellants, &c.

STORY for the respondent, prayed an appeal, which was allowed. Afterwards in the circuit court, judge Story, having been of counsel for the respondent, gave no opinion, but affirmed the decree *pro forma*. And an appeal was claimed to the supreme court of the U. S. and allowed; but it was not prosecuted.

DISCUSSIONS ON THE QUESTION,

“Whether Inhabitants of the United States, born there before the Independence, are, on coming to this kingdom, to be considered as natural-born subjects?”

BY A BARRISTER.*

December, 9, 1810.

I thought the affirmative of this question was acknowledged by all lawyers. One authority, it seems to me, is sufficient to support it; I mean, what is laid down in Calvin's case, on the supposition that the crown of Scotland might, possibly, be separated from that of England: upon which point the judges resolved, “That all those who were born under one natural obedience, while the realms were united under one sovereign, should remain natural-born subjects, and no aliens; for that naturalization, due and vested by birthright, cannot, by any separation of the crowns afterwards, be taken away; nor he that was by judgment of law a natural subject at the time of his birth, become an alien by such matter, *ex post facto*, and, in that case, upon such an accident, our *post natus* may be *ad fidem utriusque regis*,” (7. Rep. 27. b.) or, to apply the words to the present case, our *ante natus*, or American born before the separation, may be *ad fidem regis*, and also a citizen of the United States.†

[* The Barrister here alluded to, is John Reeve, Esq. the author of the History of the English Law, and other works. *Ed. L. J.*]

† The *post natus* there, that is, one born *after* the union with Scotland, corresponds with the *ante natus* here, that is, one born before the separation from America.

Such a plain and explicit authority as this, seems to make it unnecessary to search for any other; however, objections are raised to the claim of such persons, to be considered as British-born subjects.

1st. It is objected that, admitting the common law to be as laid down in the above resolution, there are circumstances in the American revolution, that distinguish it from all other changes of sovereignty. The island of Jamaica, say they, may be ceded by the king, and this being done without the consent of the inhabitants, there is no reason why they should lose their birth-right of British subjects; but the Americans, a whole people in arms, claimed to be released from the English government, and the king, at the peace, consented to give up his authority: how can such a people be afterwards considered as British subjects!

2dly. It is objected that there are certain statutes, and public acts, which stand in the way of the abovementioned common law principle taking effect.

3dly. It is even objected by some, that no principle of the common law can support so unwarrantable an anomaly, as that the same persons should belong to two states, and that admitting them to levy war against the king in the character of American subjects, without being deemed traitors, and then allowing them to come into this kingdom in the character of British subjects, is an inconsistency, which, they think, cannot be countenanced by the law of England.

To the first of these objections, it may be answered, that the peace which put an end to the American war, ought to be considered as putting an end to all the consequences that might be imputed to the Americans, by reason of their rebellion; and, indeed, there is in the definitive treaty, article 6, an express provision, that no person should, on account of the war, suffer any future loss or damage, either in his person, liberty, or property.

Further, we should inquire, what the Americans could be supposed to relinquish by making war, and what was the result of the king making peace? The Americans could not mean to renounce the privileges of British subjects; because they rebelled and made war, in order to get something which they had not, and not to surrender what they possessed: it was to release themselves from their allegiance; but no man can throw off his allegiance at his own option, as must be admitted by every one.

Did the king, then, make peace with them, in order to take away their rights as British subjects? But, surely, it is well known, that the king alone cannot take away the rights of a British subject from any one. In the peace, therefore, made with the Americans, there seems to have been no legal competency in the contracting parties, to produce the effect supposed, of making the Americans aliens. This must appear even upon general principles only; it will presently be shown that there was not, *de facto*, any thing in the treaty upon the subject of British rights, that warrants the supposition of their being taken away from the Americans.

There cannot, in a juridical point of view, be any difference between the supposed case of cession of territory, without consent of the inhabitants, and the present case of cession to gratify the wishes of the inhabitants. The allegiance, in both cases, is of the same nature; the allegiance is not to the soil, but to the person of the king; and as no transfer or cession of the soil to a foreign prince, makes any alteration in the allegiance or birth-right of the subject, but the same still remains in the person of the subject, it imports nothing, whether such cession is made with or without his consent. In both cases he becomes a British-born subject, living in a foreign land, and liable to the alteration of circumstances, which every where attends a British subject, when out of the king's dominions.

That going out of the king's dominions, under the charge of criminality, at the choice of the party, and by the king's consent, does not make a British subject an alien, is evinced from the old law of sanctuary, in cases of felony and abjuring the realm to save the felon's life. It is expressly laid down, "*Qui abjurat regnum, amittit regnum, sed non regem; amittit patriam, sed non patrem patriæ*"; for notwithstanding the abjuration, he oweth the king his allegiance, and he remaineth within the king's protection; for the king may pardon and restore him to his country again. Allegiance is a quality of the mind, and not confined to any place." (Calvin's case, fol. 9. b.)

As to what is now said, of the Americans being a whole people in arms, demanding to be released from their allegiance, it should be recollected, that the language in this country, during the whole of the American war, was different: it was said, "the thinking part, those who had property and character," and some

said, "the majority of the people," were against the violent measures which were driven on by an active minority of agitators. Is it, then, at all reasonable to infer upon those persons, who were friendly to this country, the consequences of such resistance and rebellion? Indeed there is nothing so unjust in the law of England. The law does not consider the king's subjects in a mass, under the name of *the people*, in any number more or less. They cannot be considered in a legal view, but as individuals; what is the law respecting one, is the law respecting one million, and every man's case stands upon its own ground and circumstances. It is, therefore, utterly inconsistent with the law, to impute to the Americans any disfranchisement as a people: if there is any such extinguishment of rights, it must be in some individual; and if it is not to be discovered in one, it is not to be found in a million.

Secondly, as to the statutes and public acts which are supposed to stand in the way of the abovementioned principle of common law: the principal statute which, I believe, is relied upon, is statute 22 Geo. III. c. 46. This is a parliamentary authority, enabling his majesty to make peace with America; an authority which had become necessary, because the parliament had passed some acts of prohibition and penalty which might stand in the way of peace, as stat. 16 Geo. III. c. 5. and stat. 17 Geo. III. c. 7.* for prohibiting trade and intercourse with America, and for authorising hostilities against the rebels. The American war having thus become a parliamentary measure, it required the concurrence of parliament to make peace, which, in ordinary cases, belongs to the king alone.

Accordingly, stat. 22 Geo. III. c. 46. authorises the king to conclude "a peace or truce with the said colonies or plantations, or any of them;" and that the abovementioned prohibitory acts might not be an impediment to the progress of negotiation, the statute authorises the king "by letters patent, under the great seal, to repeal, annul, and make void, or suspend the operation or effect of any act, or acts of parliament, which relate to the said colonies or plantations;" meaning under these general words, most probably, the abovementioned prohibitory acts, and none other.

* These acts were afterwards repealed by stat. 23 Geo. III. c. 26.

There might be another reason for an act of parliament, namely, some hesitation as to the persons with whom the king's commissioners were to treat, whether they had competency: therefore, the act speaks of treating with *commissioners* named by the colonies, with any *body* or *bodies politic*, with any *assembly* or *assemblies*, or *description of men*, or with any *person* or *persons* whatsoever.

Such are the provisions of the act for making peace with America, which is supposed to give authority to the king, to take away the rights of British-born subjects from the inhabitants of the United States, and make them aliens. I can only ask those who allege this act, to show us by what words, or by what construction of words, such power is given to, or is intimated to reside in, the king? And with such appeal I dismiss this statute.

The next document that occurs, in course of time, is the definitive treaty, made in September, 1783, in pursuance of such parliamentary authority. In the first article of this treaty, the king "acknowledges the United States (naming the several colonies) to be free, sovereign, and independent states; and for himself, his heirs, and successors, relinquishes all claims to the government, propriety, and territorial rights of the same, and every part thereof." This leading and general provision being made, there follow in the treaty some few subsidiary stipulations, all tending to give effect to the above relinquishment of sovereignty, and to the confirmation of peace and amity. After reading these, I must again ask the like question as before, where is the provision, in the treaty, for doing that which I have not yet discovered the king was authorised by the act to do? It appears, from reading the treaty, that the king has not, *de facto*, done that which he was not enabled by the act, nor was otherwise authorised, *de jure*, to do. He has not taken away the rights of British-born subjects residing in the United States, nor has he renounced the allegiance of his natural-born subjects residing there; he has acknowledged the colonies to be free and independent, and relinquished all sovereignty over their territory: in doing so, he has departed with some of his own royal prerogative, and has circumscribed the claims he before had on the allegiance of his natural-born subjects *residing there*. This was his to give, and he has given it, but the rights of British

subjects the king had no power to take away; he has not, *de facto*, taken them away; nor was it a time for taking, but a time for giving and conceding: the Americans meant to add to what they already enjoyed. They would have felt it an injury, if it had been proposed to them, no longer to be deemed British-born subjects; and recollecting, as we must, the feeling and speculations in this country, looking forward, as many did, to the colonists quarrelling amongst themselves, and coming back, all, or some of them, to their old connexion with us, we may be sure no one in this kingdom would have ventured to propose, that they should be stripped of the character of British subjects, to which they were born, and be rendered aliens, under circumstances which would indicate, on our part, a disposition to perpetual estrangement and enmity.

So far from this, I think, there is even in the treaty an express saving of the rights of a British-born subject, among other rights and claims. In article 6, it is provided, "That no person shall, on that account, (meaning the preceding war) suffer any future loss or damage, either in his person, liberty, or property." If an American comes to this kingdom, and is treated as an alien under the alien act, he assuredly suffers in his person and liberty; and such suffering must be on account of the war, which those ought to allow, who make the first of the above objections: he surely cannot be said to suffer by the peace, which was meant for conferring advantages, not for taking them away.

The next document, where we are to look for something which is to control the above principle of the common law, is the commercial treaty, 19th of November, 1794. But in this I can find nothing to the effect supposed, and I must put the like interrogation as before; yet with still less expectation of an answer, because, in this treaty, we have something more than negative evidence, we have here express testimony, that the rights of British-born subjects were intended to be continued to the Americans by the first treaty, and that it was intended, by the commercial treaty, to give them a longer continuance to their posterity. By the 9th article it appears, that the American citizens then held lands in the dominions of his majesty; but they must be British-born subjects to hold lands, and not aliens. It appears, therefore, that his majesty, in November, 1794, eleven years after the treaty of peace, recognised the citizens of the

United States as British-born subjects. I lay this stress upon the declaration of the fact, because I cannot suppose a public and solemn instrument, as this treaty is, would speak of lands being holden in any other sense than that of being *lawfully* holden.

The framers of the treaty certainly understood it in that sense, because the provision they intended to make was, to fortify the titles to these lands in future times, when, certainly, the title to them would become not lawful. They foresaw that, although the present possessors were British-born subjects, their descendants, born in the United States, out of the king's allegiance, would be aliens.* It was accordingly stipulated, "that neither they nor their *heirs* or assigns shall, so far as may respect the said lands, and the legal remedies incident thereto, be regarded as aliens." If it should be objected, that the provision here speaks as well of the present possessor as the heirs, the answer is, that it would not have been so well worded, if the present possessor had not been named; and if he had not been named, as well as the heirs, it might have been construed into an implication, that he was to be excluded from the protection intended for the heirs only.

Another more probable reason for this stipulation was, to bind the two nations, not to *make* any disqualifying law, that by rendering the others aliens, would disable them from holding lands. This future possibility, without any doubt about the then-present state of the law, might be sufficient reason for such a cautionary provision.

Whatever observation may be indulged on this part of the article, the averment in the beginning of it remains unaffected; and this averment, of Americans being British-born subjects, is again published, ratified, and confirmed by parliament, in stat. 37 Geo. III. c. 97. sect. 24, 25. which was made for carrying into execution the treaty. This article of the treaty is there recited at length, and the two clauses, sect. 24. and 25. purport to carry it into execution.

* They might for their sons, and grandsons, have the benefit of stat. 7 Ann. c. 5. stat. 4 Geo. II. c. 21. and stat. 13 Geo. III. c. 21. but for later descendants, they needed a new provision.

If there is any thing in this statute to control the effect of the common law position so often alluded to, I think it should be in these two clauses; yet I have not been able to discover such a meaning, and I must leave it to be demonstrated by those who have found it out. The clauses appear to me to have something particular in them; they omit the naming of *heirs*, which was the enactment most wanted, and they supply this omission by a winding wordiness in the proviso, that is not easily evolved. There is a grudging caution in the whole conception of these clauses: I believe the framers of them did not like the matter of them, being unwilling to bear this parliamentary testimony to the legal conclusion, that *ante nati* Americans are British-born subjects, so as to hold lands.

As to the third objection, the anomaly and inconsistency of Americans being citizens of the United States while there, and being British-born subjects when here; this is not a novelty, nor is it peculiar to Americans. It may happen to any British subject, and it is allowable in our law, which recognises this double character of a person being, as was before shewn, *ad fidem utriusque regis*.^{*} British subjects may voluntarily put themselves in such a situation; it is part of the privileges of a British subject to be at liberty so to do. Have we not British subjects who are naturalised in Holland, in Russia, in Hamburgh, in various places on the continent of Europe? Do not British subjects become citizens of the United States? Some persons are born to such double character; children and grandchildren, born of British parents, in foreign countries, are British-born subjects, yet these, no doubt, by the laws of the respective foreign countries, are also deemed natural-born subjects there.

Thus far of individuals; the like may happen to a whole community, a whole people. When the king relinquished his sovereignty over the United States, the land became foreign, while the inhabitants remained all British subjects. When the king's forces took Surinam, and the other Dutch colonies, the land became British, but the inhabitants still continued foreigners. The personal character of alien, with which the Dutch colonists were born, still remains to them, and the indelible character of

^{*} Vid. ant. p. 30.

British subject, with which the Americans were born, remained to them after their country was made foreign.

I am aware of the difficulties which such persons may labour under, with these double claims of allegiance upon them. Such difficulties must be got through, as circumstances will allow, and consideration should be had for the parties, according to their respective situations; more especially with a distinction between those who brought themselves into such embarrassing situation voluntarily, and those who were born in it; and more particularly with regard to the difference between that, which is the act of private individuals, and that, which is a national proceeding, involving a whole people. In weighing such circumstances, it will soon appear, that these are all objections which relate more to facts than to the law of the case; they are inconveniences in the way of full exercise and enjoyment of the rights in question, but detract nothing from the rights themselves. On the one hand, the king cannot reckon upon the full and absolute obedience of such persons, because they owe another fealty besides that due to him; on the other hand, the subject cannot have full enjoyment of his British rights. Indeed, it will be found, he will have as little of his own rights, as the king has of his obedience; for if the rights of a British subject are examined, it will appear, that almost all of them depend on a residence in the king's dominions, and that when he removes into a foreign country, as they are without exercise, or application, they are suspended, and have no apparent existence.

I have heard it asked, if the king was to send his writ to command the attendance of Mr. Jefferson in this kingdom?—I agree he would not come; but that would be no test of the law upon the subject; it is an inconvenience in point of fact. The law, in the execution of it, is liable to many obstructions which prevail, and yet the judgment of law is not deemed thereby invalidated. If the king had sent such a writ to general Washington, at the head of his army, I suppose he would not have obeyed it, and yet no one would have deemed it a demonstration, that he was not amenable to our law: Why then should a pacific refusal from Mr. Jefferson have in it more of the force of a legal argument? And yet, I think, Mr. Jefferson might decline obedience to such a command, admit himself to be a British subject, and have the law on his side too.

Mr. Jefferson might answer such a call upon him by saying, true it is, I was born a British subject, and I myself have done nothing to put off that character. But your majesty has, by the treaty of 1783, relinquished all sovereignty over the United States; and, as your majesty, and all the world know, it was thereby intended that your subjects here should form a government of their own; we have so done, under the faith of your majesty's grant and covenant; and it has happened, in the progress of events, that I am now exercising an office in that government which necessarily requires my presence here. I am brought into this situation in consequence of an act of your majesty, by which it was designed that myself, or some other of your subjects here, should come into such a situation: being so circumstanced, I am no longer at liberty to make a choice of my own. There is a moral and political necessity, that makes it impossible, at present, to obey the commands of your majesty; I pray your majesty's forbearance; I plead your majesty's own covenant and good faith; and I rely upon them as a justification, or excuse, for my disobedience.

Surely this would be a good plea in point of law, and Mr. Jefferson might have the benefit of his American citizenship, in perfect compatibility with the claims upon him from British allegiance. Such *scintilla juris* in the king of England, can, I should think, raise no flame in any American bosom.

There are much stronger cases, of a similar kind, that have never startled any one with their anomaly or incompatibility. Mr. J. and other American citizens have entered into their offices, their engagements, and their situations, under the faith of the king and the parliament. But how many British subjects have become citizens, burghers, burgomasters, and have taken other offices in foreign countries, voluntarily, upon speculations of private interest, and from various inducements, all of them of an individual and personal nature! If such persons had been called upon by the king's writ, they would not have had so good a plea as Mr. J. and yet, probably, none of them would have moved from their station. Was it ever heard that such persons, when returned to this kingdom, were deemed to be less of British subjects, because they had lived, and risen to public stations, in foreign states? No, certainly, they are considered as having exercised the liberty belonging to all British subjects,

respecting whom there is no restraint but the considerations of prudence which are suggested by the occasion; and yet none of these volunteers in foreign service have so much to say for themselves as an American citizen, who chuses to leave the United States, and to spend the remainder of his days in this kingdom. The local allegiance he has acknowledged to a foreign government, is recognised by the king and parliament: he has never lived wholly out of the view of the sovereign power under which he was born; and the language, law, and manners he has been conversant with during the whole of his residence in the ceded states of America, restore him to this kingdom, and to his original and natural allegiance, unchanged, and quite British. Why should a person of this description, an American citizen, be the only one rejected and excluded from the rights of a British subject, because he owes a local allegiance in another country?

There is a parliamentary record, testifying instances of such contumacy. In stat. 14 & 15 Henry VIII. c. 4. it is recited, that Englishmen living beyond sea, and becoming subjects to foreign princes and lords, "will obey to none authority under the great seal of England; but they give themselves over to the protection and defence of those outward princes to whom they be sworn subjects." It is herein recorded by parliament, that Englishmen thus expatriated themselves, and refused obedience to the king's writ; and yet no declaration or enactment was made by parliament on that point of disobedience, so as to disfranchise them, and make them aliens; but there is by that act imposed on them merely a penalty in one particular article, that of importation of goods. Such persons, it seems, had abused their privilege as Englishmen, and had lent their name to cover the goods of persons of the foreign country where they resided. To put an end to such impositions, they were in future to pay alien duties, as the subjects of the country where they resided.

Compare these recusant absentees alluded to in the statute, with the American now in question. The former voluntarily leave the kingdom, make themselves subjects of a foreign state, refuse obedience to the king's writ, abuse their privilege of natural-born subjects to defraud the revenue. The latter is born under the king's allegiance, in a country which the king has since ceded, and made a foreign land. It does not appear, this

particular person had any concern in the public affairs of the country, till it was so settled by his majesty's solemn covenant and grant. He chuses, in the latter part of his life, "to go home," (for such is the phrase in the United States to the present moment,) and end his days here. No act of recusancy, or contumacy, is imputed to him.

Now compare the consequences in the two cases: the former, though solemnly noticed and censured by parliament, is not marked by any penalty of disfranchisement, though thus alienated from his native country, but is merely mulct in the payment of alien duties; the latter is told he is an alien, and has lost his right of a natural-born subject.

The further we go, the more we find of precedent and principle against such a sentence of disfranchisement.

These are the answers which, I think, may be made to the above three objections.* These answers seem to me sufficient, and nothing further need be done but to come round to the place from whence we set out, namely, the position of law resolved by all the judges in Calvin's case, according to which the *ante nati* in the United States continue still British-born subjects, and, coming here, are entitled to all the privileges of such. The plain and explicit principle laid down, on that occasion, has, I suppose, governed the minds of lawyers, whenever they have been consulted on the application of it to American citizens. It is owing, no doubt, to this uniformity of opinion, that the question has never been brought to argument in any court. During the space of 25 years, since the independence of America was declared, there has never been so much doubt on this claim, as for any lawyer to advise a contest by suit. I deem this want of judicial determination, coupled with what follows, to be a great testimony for the affirmative of the question.

In the mean time lawyers have been consulted, no doubt, very frequently, and written opinions are in the possession of many. I have been able to obtain a sight only of two. I have seen an opinion of Mr. Kenyon, in 1784, where he declares, in few words, and without hesitation, or qualification, that American citizens may hold lands as British-born subjects. I have seen an

* I recollect another objection: how is the question of American citizens to be tried? I see this was an objection in Calvin's case: it is the second of the five inconveniences, and it is answered in the Report, fol. 26, b.

opinion of the attorney-general Macdonald, in Feb. 1789, that engaging American seamen for foreign service, should be prosecuted as the offence of enticing British seamen into a foreign service: the prosecution was commenced, the indictment found, but the attorney-general entered a *noli prosequi* upon the party paying the costs.

Among the opinions of lawyers, I must mention what I received from Mr. ———, to whom I sent a statement of the case, with the view of learning, whether any alteration had taken place in the opinions of lawyers of late days: I knew I should have from him the current opinion of Westminster-hall; he at once wrote with pencil, on the back of the paper, that such persons are British subjects; he seemed to answer it, as if it was as known and as established, as that the eldest son is the heir in fee simple.

I made enquiry at the Custom-house, where, I was told, I might possibly find notes of some decisions at *nisi prius* in the Exchequer, which conveyed the chief baron's opinion, that a domiciliation in America took away the British character from a seaman, employed in navigating a British ship. The solicitor said, he knew of no such cases, nor of such opinion; on the contrary, he said, it was the usage of the Custom-house to consider the *ante nati* in America, as British-born subjects, and they were registered as owners of British ships: he informed me also of the above prosecution for enticing British seamen, and he gave me copies of the papers.

These authorities from the opinions of lawyers, and the practice of a public office, cannot be closed better, than by an authority superior to all of them; I mean what has been already mentioned, the 9th article of the treaty of commerce, and sect. 24. and 25. of stat. 37 Geo. III. c. 97. where there is a solemn declaration by the king and the parliament, that American citizens did then hold lands; which they could not lawfully do, unless they were deemed British natural-born subjects.

After such authorities, there does not seem to me any need to add a word more.

Dec. 9, 1808.

December 15, 1808.

Since writing the above, I have been told, that the subject of *ante nati* is no part of the present question, and, that what the

objectors mean to urge, is as follows: First, That the Americans, at the time of making stat. 22 Geo. III. c. 46. were in a state of legitimate war, bearing the character of foreign enemies, and not that of rebels. This is implied in the passing of such an act, and in the wording of it:—*Peace* and *Truce*—was not the language to hold to rebels; nor did the king need the authority of an act of parliament to proceed with traitors: the act has no object, if the Americans are not admitted to be foreigners in this transaction. Secondly, That after the peace made, it still remained for Americans, if they chose, to adhere to the British character; and it is not meant to deny, that *prima facie*, the Americans are to be deemed British subjects. But those who domiciliated themselves in the United States, showed thereby a determination to become American citizens; and after such choice, they cease to be British subjects, and cannot resume that character.

If I have not stated the above points quite correctly, nor with all the advantage that belongs to them, I hope I shall be pardoned by those who made them, and who rely upon them: they were communicated to me, in a rapid conversation only; for nothing, on that side of the question, has been put into writing: I have done my best to retain what I heard, and to state it fairly and fully.

I am totally at a loss to comprehend, at what period of the war, or by what modification of carrying it on, either on one side or the other, or by what events or circumstances, that which was once rebellion ceased to be so, and the traitors became changed into aliens waging legitimate foreign war. As to the words *peace* and *truce*, I do not understand, why they are not as applicable to war, coupled with rebellion, as to war not coupled with it. For war is still war, whatever may give rise to it; and I do not see why the war of rebels is not legitimate, *quatenus* war, and, therefore, needing every consideration, that attends all wars. Surely, in the time of Charles I. there were *treaties*, and *truces*, and *peace* too; there was a peace, for a short time, I think, in 1645, and yet, the lord-chancellor Clarendon intitled the narrative of these transactions, a “History of the Rebellion;” and no man has ever doubted, be he law-man, or layman, that the war levied against Charles I. was treason and rebellion; although it was attended with success, and could command names,

and although many amongst us have long agreed in applying to it the qualified appellation of *civil war*.

As to the necessity of making such act of parliament, and giving thereby power to the king to make peace and truce, because the Americans were become alien enemies, and ceased to be traitors and rebels; it is very curious, that a different reason for making it was given by the makers of the act; that reason is recorded in the parliamentary debates of the time; and the reason so given, seems to me to supersede the necessity of inventing any new one, like the present.

The bill was called "the Truce Bill," and was brought into the house of commons, on February 28, 1782, by the attorney-general Wallace. It does not appear, that it became a subject of debate in any of its stages; the nation and parliament were bent upon peace, and any measure tending to bring it about was too welcome to be questioned or criticised.—[See Debrett's Debates, vol. vi. p. 341, 363.]

However, this act, which came into existence without a struggle, afterwards was made a subject of discussion. When it had been carried into execution, and the provisional articles with America, together with the other preliminary treaties, came to be considered in parliament, in February 1783, this act was brought in question, and there was expressed great difference of opinion, as to its original design, the construction to be put on it, and the effect it produced. In the first debate, it was objected to the provisional articles, that the king has no right, by his prerogative, nor by the act of last session, viz. stat. 22 Geo. III. c. 46, to alienate territories not acquired by conquest during the war. The gentlemen of the law being called upon by this objector,* Mr. Mansfield answered, that, certainly by the act of last session, the king was authorised to alienate for ever the independence of America.—[Debrett's Debates, vol. ix. 280.]

On a subsequent day, the same gentleman [Debrett's Debates, vol. ix. 312.] again raised a question upon this act. It appeared to him, that no such power was given to the king by the act; that any power to alienate part of his dominions, or abdicate the sovereignty of them, should be conveyed in express words, and not left to implication and construction. This brought up Mr.

* Sir W. Dolben.

Wallace, who was the framer and mover of the bill, and who declared, that such power was given by the act: he said, he knew of no power in the king, to abdicate part of his sovereignty, or declare any number of his subjects free from obedience to the laws in being. As soon, therefore, as the resolution for peace had passed the house, he had, with a view to enable his majesty to make peace, drawn the bill; and as the subject matter of it was extremely delicate, he had been exceedingly cautious in wording it as generally as possible; but the whole aim of it was, to enable his majesty to recognise the independence of America; and that it gave the king such a power, was, he said, indisputable, because by the wording of it that power was vested in the king, any law, statute, matter, or thing to the contrary notwithstanding.

This explanation, by the mover of the act, did not satisfy the objector, who had been the seconder of it, but who now declared, he had never supposed such an interpretation could be put on the bill; and if he had thought it could, he would not have seconded it: but it was defended by the attorney-general Kenyon,* who said the act clearly gave authority to the king to recognise the independence of the Americans; adding, that it was obvious, the Americans, standing in the predicament of persons declared to be rebels at the time of passing the act, it was necessary to word it in the general and cautious manner in which it stood upon the statute book.

Though the attorney-general Kenyon thus supported the late attorney-general Wallace, in the construction and effect of his act, he, at the same time, denied the position, that the prerogative of the crown needed any such special act of parliament, to empower it to declare the American independence. Mr. Lee joined in opinion, upon that point, with Mr. Wallace. [Debates, p. 314, 315.]

A like difference of opinion was discovered among the law lords, in the discussions of the provisional articles, and the preliminary treaties. It was maintained by lord Loughborough, that the king had no authority, without parliament, to cede any part of the dominions of the crown, in the possession of subjects under the allegiance and at the peace of the king; and this, his

* He succeeded Mr. Wallace, on the change of the ministry, in March 1782.

lordship said, could be proved by the records of parliament. This doctrine was treated by lord Thurlow as unfounded, and he strongly maintained the contrary.—[Debates, vol. ii. p. 88, 89.]

The difference between the two lords had arisen, not upon the independence of the United States, but upon the cession of the Floridas to Spain; and it was on that account, no doubt, lord Loughborough stated his proposition with the words, *under allegiance and at the peace of the king*, which was a proper description of the Floridas; but the same could not be said so fully of the United States, which, though under the allegiance, could not be so well said to be at the *peace* of the king. Lord Thurlow, it is plain, did not admit, that this difference in circumstances made any difference in the power of the prerogative. It must surely be confessed, that this cession of the Floridas to Spain, at the very moment that the American independence was acknowledged, makes a great breach in the hypothesis of Mr. Wallace, Mr. Lee, and lord Loughborough, who thought stat. 22 Geo. III. c. 46, absolutely necessary for enabling the king to alienate part of his dominions. Indeed, the precedents are all against such a restriction on the prerogative; for when has there been a peace, that some West India island has not been ceded, not only such as has been taken during the war, but those of ancient possession? In truth, this is another distinction that has no solid foundation in law, but is a mere conceit. It is well known, that the laws of navigation attach upon a possession in America or Africa, immediately on a surrender; and the territory is, to all intents and purposes, as much the king's as any ancient colony or plantation. It is therefore wholly assumption to raise the above distinction, and to consider such a conquest as less a part of the dominions of the crown, and less under the protection of parliament, than the more ancient possessions.

But taking the judgment of parliament, (which finally approved all these treaties) for the supreme authority on this question of law, we are obliged to conclude, that the king had power to relinquish to the king of Spain his sovereignty over the two Floridas, without the special authority of any act of parliament, enabling him so to do. This is a decision, after argument, when the objection had been taken and reasoned upon, and both sides heard openly and fully. It cannot, after that, as I think, be doubt-

ed, that the same parliament would have recognised the king's power to relinquish his sovereignty over the United States, although there had been no such act as stat. 22 Geo. III. c. 46. The relinquishing of sovereignty to the king of Spain, whereby he parts with all royal authority over his subjects in the Floridas; and the relinquishing of sovereignty over the colonies of New Hampshire, &c. &c. to the United States, whereby he parts with all royal authority over his subjects in New Hampshire, &c. &c.; where is the difference, in a juridical view, between these two cases? If you analyse them, and bring them down to their first principle, you will find it amounts to the same thing in both cases; to this, and nothing more, namely, that he makes the Floridas, and makes New Hampshire, &c. equally foreign dominions. Every consequence that follows upon the relinquishment of sovereignty, is ascribable to that, and to that only. The inhabitants of the Floridas, and of New Hampshire, &c. &c. become British subjects living in a foreign land, and lose all British advantages, now that British ground is taken from under them, in like manner, and in none other, as if they had removed themselves to the foreign soil of Spanish, or Portuguese America. Indeed, no one has ever pretended, that the inhabitants of the Floridas, who were British subjects born, were made aliens by the cession, though some do mistakenly suppose, this deprivation to happen to Americans of the United States, who were put under the same circumstances, at the same time, by the same, or by a similar operation, certainly for the same purpose, that of peace.

I say, that the cession has the single effect of making the Floridas, and the united states of New Hampshire, &c. &c. foreign countries; and, that no alteration is made in the birthrights of British-born subjects, because, what is covenanted, granted, and agreed in the treaty, relates wholly to the former, and there is not a word that relates to the latter. The Floridas are ceded to the king of Spain; that contains in it nothing so particular as to raise a question: the material consideration is, the case of America. The definitive treaty begins by the king acknowledging the united states of New Hampshire, &c. &c. to be free, sovereign, and independent states; and he relinquishes all claims to the government, propriety, and territorial rights of the same: the king here parts with *the states*, that is, the political machinery formed

for the government of those colonies, the governor, the assembly, &c. &c. &c. and declares them independent; to make this independence quite clear and unclogged, he relinquishes all territorial sovereignty. The thing given up by the king, is his own superintendence and authority over the local authority of those places; of the individuals his subjects, there residing, he says nothing; there is not a word in the treaty affecting their birthright, as British subjects.

There is certainly not a word expressed upon that point; but I think the great mistake in this discussion, and that which misleads those on the other side, is, an implication which they think necessarily arises upon this transaction of granting independence to America; and they allow themselves to be carried away by the force of expressions, which, without any defined meaning, seem to signify something, and are repeated, without examination into their import. It has been said, that by acknowledging the independence of the United States, the king *dissolved the allegiance* of the Americans, and they of course were made aliens; this is an inference drawn from the independence, but it is wholly a fiction of imagination among politicians; there is no such principle in the law of England; it never was heard of: can any book, case, or dictum be shown, that gives the most remote intimation of any such operation? In the cession of territory, the king has always forborne to declare any thing expressly on the article of allegiance; and never before has any one raised the construction, that allegiance was ever surrendered by the king, any further than the nature of the cession did, in point of exercise and enjoyment, circumscribe the scope of it. As the king has, in no case of cession, made an actual relinquishment of allegiance due to him, so has he, in no case of such cession, ventured to take away what was not his, but belonged to the individuals his subjects; who were to suffer enough in being compelled thenceforward to live in a foreign land, and who might very well be indulged with the consolation of retaining their birthright of British subjects; a right which might be brought into enjoyment and exercise, whenever they should again come to live upon British ground.

With all the instances of cessions, which are examples to the contrary, I cannot understand, how any one should entertain the imagination of their effect in *dissolving personal allegiance*, ac-

accompanied too with such an inconsequent result, as, that the British subject, so released, becomes thereby an alien.

To return to the objection which I was to consider, in regard to the design and effect of stat. 22 Geo. III. c. 46; it appears, from what I have before detailed out of the Parliamentary Debates, that the statute was deemed necessary, in order to satisfy the scruples of some persons, who thought, that the king had not, at common law, power to alienate any part of his dominions; further, that it was necessary the king should have power to suspend the operation of certain acts of parliament, which, it was foreseen, might stand in the way of making peace. It was afterwards contended, that the statute had also the special effect of authorising the king *to grant independence* to the colonies; because, as it empowered him to make peace or truce, any law, statute, matter, or thing to the contrary notwithstanding, it of course, say these objectors, empowered him to grant independence, or indeed any thing that should be deemed necessary towards making such peace or truce; meaning by such independence, disfranchisement, and converting the Americans into aliens.

After such explicit discovery, as was before made, of the nature and design of the act, how are we to acquiesce in the construction thus put upon it in the objection? What reason is there for saying, that the act has no meaning or object, unless the Americans were admitted to be aliens and foreigners, in a state of legitimate war, and not rebels?

The second of these renewed objections to the grand common law position, on which I build this argument, is, to my understanding, as extraordinary, and as anomalous, as the preceding; but it is not so novel. I admit, I have before heard the notion of Englishmen *domiciliating* themselves in the United States, and being, in consequence of such election, pronounced to be no longer British subjects, but aliens and American citizens only; yet it always seemed to me to be an arbitrary and groundless assumption, totally irreconcilable to principle or precedent.

As to the precedent, I must again recur to the instances of the Floridas, Tobago, and other places, that have been ceded to foreign powers. Was it ever objected to the British-born subjects inhabiting those countries, that having domiciliated themselves there, they were considered as aliens in the British dominions? Where should men be domiciliated, but where their home is?

And did it ever enter into the mind of the king or his ministers, that, upon a cession of territory, the British-born subjects inhabiting there should migrate, at all hazard to their worldly affairs, and the prosperity of their family? There are no such migrations, no such expectations of them; nor have they ever been deemed necessary for keeping alive the birth-right of a British subject. Why then should it be necessary, for the first time, in the case of the inhabitants of the United States?

I think it erroneous in principle, because it makes *that* depend on the option and capriciousness of the person himself, which has ever been deemed an indelible character, one he is not at liberty to put off, that of a British subject. All the maxims, that we have heard about birthright and natural allegiance, are contrary to such a supposition, of a person choosing whether he will cease to be a British subject, and begin to be an American citizen; but all those maxims are consistent with the construction which I contend for, namely, that such persons owe a local allegiance while in America; and, when they come here, their rights of British subjects revive, and their natural allegiance attaches: and, it cannot be denied, that in such a state of things, there is a reciprocity of duty and protection, between the sovereign and the subject, which is quite commensurate with their respective situations.

This imagination of optional allegiance, and extinguishment of natural rights, is wholly inconsistent with the position resolved in Calvin's case, which is laid down generally, without making the consequence of continuing the rights of birth to depend on any condition or observance whatsoever. Such absolute, entire, and indelible quality, is what the common law ascribes to those rights of subjects that come to us by birth, and by birth only.

Such are the observations to which these two new objections seem to be open. These objections do not appear to me to have more force in them than the former; and I do not see any thing in either of them to invalidate the resolution in Calvin's case, and the application of it, without any qualification, or deduction, to citizens of the United States.

Dec. 15, 1808.

December 16, 1808.

In a conversation with a civilian upon this subject, I found he had made up his mind to the negative of the question; but it was upon principles wholly independent of the common law. He con-

sidered British-born subjects, residing in an island or country ceded by his majesty, to become thereby aliens; he could not, therefore, he said, doubt about the state of Americans, especially after the act of parliament, which has been so often cited. He called for some case lately decided in the courts at Westminster, to contradict what he alleged of ceded countries; I had none to adduce, and could only refer to the common law principle, which had never been denied.

I perceive, that the civilian went upon the law of his court, where they hold, that persons take their character from the country where they reside; so, the ceded country becoming foreign, they deem the inhabitants foreign too. Such is the rule in prize causes, where hostility is to be regarded, which must ever be a national, not a personal consideration; accordingly, an enemy's country makes all the inhabitants enemies. So, indeed, at common law, the country gives the character to the persons who inhabit it, in matters that are governed by the character of the country. The British-born subjects of a ceded colony lose their character of British colonists, because their country has become foreign; they are restrained by the navigation laws that before protected them; they cannot trade as British colonists. They are foreigners, therefore, in every thing that relates to the country they live in, as the civilian contends; but the common lawyer will add, they are in their own personal rights still British subjects, as they were born; and they will be intitled to claim the privileges of such, whenever they remove from the foreign country which obstructs the application and exercise of them, and come to a place, that is, some place in the king's dominions, where alone the privileges of a British subject have their exercise and application.

In truth, the character of a British-born subject is not merely national and local, but personal and permanent. It is born with him, and remains with him during life, never to be divested; unchangeable, indelible. It is not so with what is called a *British subject*; that does, indeed, depend upon locality; and that is the character which the civilian contemplates. I believe, much of the misapprehension, upon this occasion, has arisen from not preserving the distinction between *British subjects*, and *natural-born British subjects*; they are not the same, though, I believe, they are reasoned upon as if they were.

British subject, and *alien*, are not terms contradictory; because the two characters may concur in the same person: the inhabitants of the Dutch colonies, now in our possession, are *British subjects*; they have taken the oath of allegiance, and they have the advantages of British colonists; but they are aliens, because they were born out of the king's allegiance. The inhabitants of the Floridas, born while those were British colonies, are, however, not now British subjects, because they inhabit a foreign country; nor are they aliens, because they were not born out of the king's allegiance; but they are natural-born British subjects, because they were born within the king's allegiance: so that it may be predicated of the same person, that he is a "*British subject*," and an "*alien*;" that he is "*a natural-born British subject*," and not a "*British subject*;" accordingly as you speak of the local and national character, or of the personal character. "*British subject*" is a term of common parlance, that has not properly a legal defined meaning: it serves sufficiently in ordinary discourse, for "*natural-born subject*," but it can be properly applied only for intimating the local and national character. The true legal description is that of *natural-born subject*; this is the opposite to *alien*; and these are the terms that describe the *personal* character, which is the only one sought in the present inquiry, and the only one that is a subject of discussion in the books of the common law.

Through the whole of the argument, I have been insisting on this *personal* character of British-born Americans; but those who object to my conclusion in favour of them, from the common law principle (which principle, however, they do not pretend to dispute), keep their eye principally on the *local* and *national* character of the present Americans. Their two great topics are quite of that sort; namely, the stat. 22 Geo. III. c. 46, for making peace or truce with *the colonies and plantations*; and the definitive treaty, which acknowledges the independence of *the United States*, and relinquishes *sovereignty, propriety, and territorial dominion*. Surely all these are national and local ideas, rivetted to the very soil, and limited by metes and bounds. Nothing is, by either instrument, said or done, as to the *personal* character of the inhabitants; that was left, as the personal character of the inhabitants of the Floridas, to the sentence and disposition of the law, when any of the individuals, residing there, chose to remove

himself into a situation, where his *personal* character could be brought into question, and considered distinctly from the *local* and *national* character, which the king of Great Britain had been pleased to superinduce upon him by ceding the country where he was born; that is, when any such individual should choose to come into the king's dominions, where alone his personal rights can have their application and exercise.

The only consideration for us, in this country, seems to be such personal character, whether it is the case of a native of Florida, or a native of the United States, born within the king's allegiance.

Dec. 16, 1808.

December 17, 1808.

A passage has been cited by the objectors, from Mr. Woodeson's lectures; and as this is the only book-authority they have been able to adduce, it must not be let pass without observation; especially as it has acquired a sort of reflected consequence, by being inserted in sir Henry Gwillim's edition of Bacon's Abridgement, title "Alien." The passage is this, "But when by treaty, especially if ratified by act of parliament, our sovereign cedes any island or region to another state, the inhabitants of such ceded territory, though born under the allegiance of our king, or being under his protection, while it appertained to his crown and authority, become, I apprehend, effectually aliens, or liable to the disabilities of alienage, in respect to their future concerns with this country. And similar to this, I take to be the condition of the revolted Americans, since the recognition of their independent commonwealths."—[Vol. i. p. 382.]

To those who insist on this as an authority for saying, that such persons become aliens, and cease to be natural-born subjects, it might be enough to reply, that a proposition laid down with an alternative, as this is, has not in it sufficient precision to be authority for any thing: "effectually aliens, *or* liable to the disabilities of alienage," is a circumlocution that does not suit with the plainness required in a juridical proposition. And yet, I think, the author has expressed himself not unsuitably with another sense of the word *alien*, accompanied, as it here is, with an exposition. It seems to me that "*or*" is not intended here to be a conjunction merely; but it bears a sense that is not uncommon, it introduces a member of a sentence that is meant to be

explanatory of the foregoing; and is the same as "or in other words," "or to speak more plainly," "or to speak more properly." In this sense of "or," he explains the meaning of "effectually aliens," by shewing, they are liable to the disabilities of alienage in respect to their "future concerns with this country." Their "future concerns with this country," must be the trade they carry on with this country; something which they transact from a distant place, something that affects the whole community, something that arises out of their locality and national character. He is speaking of the local and national character, which we discussed before (in pa. 459), and which was superinduced on the inhabitants of these ceded countries, in respect of which the inhabitants become a species of aliens, or as the author expresses it in an undefined epithet, "effectually aliens," or, I suppose, "in effect aliens;" that is, in the case of trading with this country.

I take this to have been what the author's mind was then contemplating, the local and national character of such ceded colonists; and by no means their personal character, that of natural-born subjects, which he knew, as well as all lawyers, can neither be surrendered nor taken away.

Mr. Wooddeson has certainly been not sufficiently technical in expressing himself upon this occasion. It may be fit enough to oppose what he has said, by an expression in the treaty of peace, which, though in like manner not technical, has evidently a meaning that cannot be mistaken, and that makes against his conclusion. In the fifth article, it is agreed, that congress shall recommend to the legislatures of the respective states, to provide for the restitution of confiscated estates which belong to *real British subjects*. Now, if there are "real British subjects," it is implied, there are British subjects who are *not real*, that is, less so than the others. No one can doubt, that the one expression means British subjects, not comprehended within the new states, erected and recognised by the king's acknowledgment in the treaty; the other must mean those inhabiting the United States. It is plainly indicated, therefore, by this phrase, that both contracting parties in the treaty admitted, that the inhabitants of the United States did remain, in some sort, British subjects; and the mode in which they so continued can only be that, which I have been contending for.

Dec. 17, 1808.

According to the foregoing reasoning, I think the law officers, if consulted, would give an opinion somewhat to the following effect.

Supposed opinion of the law-officers.

“ In obedience to your lordship’s commands, we have considered the question, whether inhabitants of the United States, born there before the independence, are, on coming to this kingdom, to be considered as natural-born subjects; and we are of opinion, that such a person, coming to this kingdom, cannot be denied the character and privilege of a natural-born subject.

In forming this opinion, we have given due consideration to all the topics that have been suggested to us from different quarters, on both sides of the question, as well as to the principles of the common law, which are to be found in books of known authority amongst lawyers.

Among the suggestions that have been made to us, are stat. 22 Geo. III. c. 46, and the definitive treaty of peace with the United States; and we find ourselves obliged to declare, that nothing in those two instruments appears to us to make any alteration in the case of Americans, when compared with others of his majesty’s subjects who reside in a ceded country. In like manner as the inhabitants, natural-born subjects of his majesty, in the two Floridas, ceded to the king of Spain, (at the same time that the independence of the United States was acknowledged) are still deemed to retain their privilege and character of natural-born subjects, so, we think, these persons, being similarly circumstanced, when they come into this kingdom, cannot be denied to retain their original privileges and character.

Our reasons for thinking, that the statute and treaty make no difference or peculiarity in the case of the United States, are these: The statute, upon the face of it, appears to have been made for two purposes; First, To enable the king to make peace or truce with the colonies or plantations in question; Secondly, To enable the king to suspend the operation of certain acts of parliament that might stand in the way of peace. The need of the second provision is obvious; the need of the first is not so plain; but we are told, in a debate in the house of commons, by the attorney-general Wallace, who drew the bill and moved it, that it was intended to give the king a power of alienating those

colonies; a power which he, and some others, considered the king as not possessing by the common law. Without saying any thing, at present, on the justness of such opinion, we allege it as the best testimony to the design of the act. This design is perfectly consistent with the conception and wording, and it does not appear to us necessary, or proper, to suppose any other meaning in this act. We conclude, therefore, that there was no particular design, by this legislative measure, to make any alteration in the personal character of the Americans, beyond that which necessarily must, and always has followed upon the cession of any of his majesty's colonies.

After these observations on the act for enabling the king to make peace, we come to the definitive treaty itself; and we find ourselves compelled to declare, that as we perceive no design in the act to enable the king to alter the personal character of the Americans, so in the treaty we discover no declaration or provision that can be construed expressly, or impliedly, to alter their original character of natural-born subjects, and to make them aliens.

In the first article of the treaty, the king acknowledges the United States of New Hampshire, &c. &c. to be free, sovereign, and independent states; and he relinquishes all claim to government, propriety, and territorial rights of the same. It is upon this provision, and these words, that the separation and independence of those colonies are grounded. The effect of this provision appears to us to be confined wholly to the soil and territory, which is thereby made foreign, and ceases to be a part of the king's dominions; we cannot discover any thing that at all affects the personal character of the natural-born subjects, inhabiting such foreign territory.

Indeed, we are much surprised that any such peculiar effect should be ascribed to this cession of territory to the United States, (for so it is, in truth) when, at the same peace, the adjoining colonies, the Floridas, were ceded to the king of Spain; and no such consequences of the cession are supposed by any body to affect the natural-born subjects residing there. We may here too remark, that the cession of the Floridas was made without any such enabling statute, by the king's common law prerogative; which demonstrates, that in the opinion of the majority of parliament, who approved the treaty, the act of the attorney-

general Wallace owed its origin, not to an absolute necessity in law, but to an abundant caution, or some scruple in politics, which deserves no regard in a juridical consideration of the subject. We are not able to discover any distinction in the two cases of the Floridas, and of the United States. In both instances the soil was made foreign, and the inhabitants had superinduced upon them a new local and national character; that is, they became locally the inhabitants and subjects of a foreign nation, and they lost advantages of trade, and benefits of various sorts, which natural-born subjects must lose, when they inhabit, and make themselves subjects of a foreign land. But, under the control of this new local and national character, their personal character of natural-born subjects still remains; and we see nothing in law to prevent it reviving, and enjoying all its privileges, when the person comes into the king's dominions, where, alone, the rights of a British-born subject have their full application and exercise.

Having declared this our opinion, that nothing is, *de facto*, done by the act or the treaty to take away the personal character of natural-born subjects residing in the United States, it may seem unnecessary, though we think it not unsuitable, to add, that we know of no instance where the crown has presumed to exercise the power of taking away the personal rights of a natural-born subject; neither have we met with any principle in the law of England, that warrants such a supposition; nor can we conceive any proceeding, by which such a divestment or extinguishment of natural rights can be enforced. As the common law recognises no such principle as that of disfranchising a natural-born subject, the character has been deemed indelible; and the parliament has never interposed, on the occasions of cession of territory, to take from the British inhabitants of such countries that, which the common law has permitted them to retain.

Such having been the construction of law, in cases of cession, which have been made, sometimes, no doubt, against the wishes of the inhabitants, and always without asking their consent, a principle of law has grown up, and established itself, which it seems too late now to question in the case of the United States. We have given full consideration to the difference of circumstances which led to that cession, the rebellion, and war that preceded it, and were the cause of it, and the claim of the colonists to be independent; but, we think, this difference of circumstances

makes no alteration in the legal result arising from the new situation of the parties. Such matters are, as we think, wholly political; and as they are not of a nature to be subjected to any juridical examen, we do not see how they can be brought into the account, when we are applying the legal principle before mentioned.

Conformably, therefore, with the principle and practice that have long been acknowledged, and declaring that there appears no reason in law for not applying the same principle to the inhabitants of the United States, we repeat the opinion we before expressed, that the persons described in the question ought to be considered, in this kingdom, as natural-born subjects."

Such, I think, would be, or should be, the opinion of the law-officers on the present question.

Dec. 20, 1808.

Reply to observations on the subject of the foregoing argument.

January 17, 1809.

First, I cannot admit there is any straining to bring the Americans within Calvin's case; and I maintain, the circumstances, that distinguish them from the precise point in that case, are fairly and fully considered by me.

It may not be necessary, in arguing with you, to adduce such authority as Calvin's case, because you do not dispute it. But the persons I had to deal with were ignorant of the principles of that case, and I needed such an authority to set them right. I know no book case where the principles of allegiance and native rights are laid down and explained, except in that only instance; the principle and nature of allegiance, and of native rights, is the first step in the present argument, and the subsequent parts of it would have been without foundation, if I had not taken that case for a basis.

The necessity for going so far back in the argument was shewn to me by the civilian;* who laid down the law, that the king's subjects of a ceded country become thereby aliens; when he called for some decided case to show the contrary, I had no decided case (you know there is none) but the resolutions and

* Ant. pa. 51.

arguments of Calvin's case. He felt this to be an important authority; and the piece of law, which you admit, I doubt whether you can ground upon any other authority in the books. The circumstances in Calvin's case are different from those of the Americans; but the principle is the same (I mean the principle of the resolution that I quote): whether that difference in circumstances makes any difference in the application of the principle is the very question in hand.

Secondly, You here admit, that natural-born subjects, continuing their residence in a ceded country, do not thereby become aliens: you go so far as to think, that, if they joined in war with their new sovereign against this kingdom, it would be treason in them. I will not say any thing upon this point, except to remind you, that my argument is wholly confined to an American coming to this country, and residing here.

The other point in this part of your answer makes the main of your third article.

Thirdly. Your third topic is, the difference between ceding a country to a foreign power, and the constituting of a sovereignty from among British subjects, and ceding the country to such new made sovereignty. You call it, making a treaty with *the subjects themselves*, that *they* should hold the country, as an independent state; "he ceded his sovereignty to *them*." You rely upon this difference in circumstances, which you make between ceding to a foreign sovereign, and ceding to British subjects, as you term it; and you mention one certain result from this difference, that, in the former case, the levying of war by the natural subjects would be treason; in the latter case, it would not. I protest, I do not discern this distinction; in both cases, the subject is put into such peculiar situation by the act of the new sovereign; and being so circumstanced, why should it be treason in an inhabitant of Florida, more than in an American, to obey the militia law of his new sovereign, and bear arms against us, like the rest of his fellow subjects!

Some persons would argue differently from you on this point: those who distinguish the British subjects of the Floridas, because they were given up against their will, or without their consent, from the Americans, because these claimed to be independent, would not infer upon the former, who were wholly passive, the crime of treason, and acquit the latter, who sought and made

choice of the peculiar situation of double allegiance, in which they have placed themselves.

However, this point, as I before said, does not bear upon our present question, which relates to the American, while he is in the king's dominions.

But you rely upon the difference of "the treating with the Americans, and giving up to British subjects the sovereignty of the country." I think there is in this an assumption, and a reliance upon words, which has no support from the real transaction. To come up to the representation you make about "*them*," and "*they*," there ought to be a covenant and grant from the king, to Mr. A., Mr. B., Mr. C.; and the said Mr. A., Mr. B., and Mr. C., ought to be plainly estopped and barred by what they took under such covenant and grant from the crown. When we had thus ascertained who are legal parties to the transaction, and legally bound by it, we might then inspect the charter or instrument, and search, whether the king, by the terms of it, relinquished his claims of allegiance wholly, or in part; and whether the British subjects, therein named, had expressly relinquished, or were expressly deprived of their native rights, or whether such deprivation arose out of it, by necessary construction.

I think, such should have been the form of the transaction, in order to come up to your supposition; but when we examine it, we find it to be quite another sort of proceeding. As to Mr. A., Mr. B., and Mr. C., it is a matter *inter alios acta*; they are not parties, not named, not alluded to; it does not appear to have been transacted by them, or for them. Let us consider the treaty of peace, which must be the instrument, if any, that produces the supposed effect.

The treaty declares New Hampshire, &c. &c. &c. to be free and independent *States*, and the king relinquishes the government of them. When this grant and covenant is brought to plain facts, it amounts to this, that the king will no longer send governors to those states, nor expect the legislative and executive authority to be subordinate to him. The king *gives* this to *the States*; but how can this be construed *to take* any thing away from Mr. A., Mr. B., and Mr. C.? The king gives away the allegiance, which *the States* owed him; it was his to give; but how should such free gift be construed to take away from Mr. A., and other individuals, the private rights to which they were

born? Two questions arise upon this, First; Are the native rights of individuals hereby, *de facto*, pretended to be taken away? Secondly, Could the king *de jure* take away such rights?

To talk of "treating with *them*," and "*they* holding the country independently of the king," is speaking in a popular manner, and without sufficient regard to juridical circumstances. Any inference of that sort will not be allowed by law to deprive a man, living peaceably in his house in New Hampshire, of his British rights, that he was born to, and that are personal to him, (namely, which he can carry about with him, and which do not depend on locality,) merely because some daring men have forced the king to allow the States of New Hampshire to govern him, without enjoying, any longer, the right of appeal to the king. I say, the law will not allow this, because personal rights of British subjects cannot be taken away from multitudes in a lump; they must be discussed in every individual case, and there must be a several judgment and execution against every person. Even the act of the king in this instance, though a national act, and relating to millions, is but a *personal* act; when he acknowledges them Free States, and relinquishes the government of them, he acts only for himself, his heirs, and successors; and accordingly thereto, and agreeably with the true principles of the law, he alone is bound, and the sovereignty of those States ceases to be his. But where is the *personal* act of any American relinquishing his own rights? or if there was any such proceeding, in fact, shew me the authority in law that recognises any such principle, as that a natural-born British subject can divest himself of his native character: there is no such authority; and there is the known maxim of law against it, *nemo potest exuere patriam*.

I cannot, therefore, bring myself to distinguish the treaty with America, from the ordinary case of cession to a foreign sovereign: in both cases, it is a transaction between the two sovereigns, in which the inhabitants bear no part; and it seems to me a departure from principle, to say, that the American is thereby rendered an alien, while the inhabitant of Florida is allowed to be still a British-born subject.

Fourthly, I have raised no question of the king's authority to make the American treaty. I agree with those who think he might have made it without the act of parliament; and I agree also with those who thought the treaty fell within the authority

of the act. I am satisfied with the treaty, whether with or without the act; but I contend, that neither the act nor the treaty had in contemplation to make the Americans aliens; and that neither one or other of those instruments has, in point of law, the power of producing such an effect. I raise no question upon what passed in parliament; if the parliament approved the treaty, they left to us to draw the inferences, and make the construction that shall appear to belong to it.

Fifthly, and lastly, you admit there are difficulties in deciding that "the treaty exempted the Americans from their allegiance, and excluded them from their rights as British subjects." In my opinion, these difficulties are made and increased by introducing phrases, and raising constructions upon them, without looking to the real proceeding, and adhering faithfully to the letter of it. You talk here of exempting the Americans from their allegiance: Why make a question of allegiance, when the king does not claim it? And what consequences can be built on the affirmative or negative of this question? What is a subject's allegiance worth to the king, if he resides in America, although he is, *bona fide*, a native of London? It is worth nothing. And if he refuses to come home, what does the law say, and what did the parliament do in a like case, in stat. 14 and 15 Henry VIII. c. 4.*? Allegiance has nothing to do with the treaty. Allegiance is personal; the treaty is national and territorial. The treaty regulates land, its metes, and its bounds; and the government of it the treaty leaves and transfers to others, *the States* of the country; the *persons* and their allegiance remain unaffected. Allegiance is general or special, local or personal; these may, and do often, in fact, consist together in the same person; why not, then, in the instance of Americans?

It is for want of attending to this modification, to which allegiance is subject, that some persons started the expedient, which you here mention, and which seems to me to contain much more difficulty in it than the one it was meant to cure. You agree with those, who think, that such Americans, as, "after a reasonable time allowed for election, subsequent to the ratification of the treaty, settled themselves in America, and chose their domicile

* Vid. ant. pa. 40.

there, became exempted from their allegiance, and excluded from their rights as British subjects."

This expedient of a "reasonable time," and "a domicile," for making a distinction between one American and another, seems to me to be a greater departure from principle, than any of the other anomalies that I have observed in their argument. There are, I admit, legal considerations that depend upon a man's local character, which may be changed by change of residence, and therefore must be ascribed to his own act and choice. But those are in cases of such a character as is capable of being acquired, and, as it is acquired, so it may be lost, by his own act; such is a man's local and national character. But the character of natural subject, which a man is born to, and to which is applied the maxim, *nemo potest exuere patriam*; to lay it down, as a position of law, that it is in a man's own choice to decide whether he will put off this character or retain it, and that his continuing his native character depends upon altering his domicile; this is, surely, one of the most singular novelties that ever was attempted in the face of an acknowledged principle to the contrary. For which principle I must again refer to Calvin's case, the whole doctrine and result of which is, that the personal rights of a subject, to which he was born, remain through life, and through all circumstances, unchanged and indelible; and that allegiance and native rights arise wholly from birth, and do not depend on actual local sovereignty for their continuance.

Such a device as this is not interpreting the law, but making it. A temporising scheme, reduced to an act of parliament, for settling this national question, might very well be so modelled: it would be a half measure, that probably would be thought reasonable enough; but this very character of it is sufficient to discredit it as a piece of juridical reasoning: it is void of all steadiness of principle; it has not even in it the consistency of the former arguments and conclusions, that "relinquishing the sovereignty," that "acknowledging the states to be free," &c. &c. implied that there was an end of allegiance and of British rights. The device was, I believe, contrived by those who found they could not maintain the above bold conclusions, in opposition to acknowledged principles of law; and, desirous of doing something, they were content to lower their notions to a medium between the two,

which would sound, as they thought, reasonable in the effect of it, however unsupported it might be in principle.

So much for this half measure of "reasonable time," and "domicile," which I have had occasion before to reprobate. I hope the difficulties, in point of law, with which this arbitrary notion is pregnant, will be avoided: if so, the other difficulties in point of fact, which you mention, will be escaped, namely, the necessity of enquiring in every particular claimant's case, when and how he was domiciliated in America, or in this kingdom.

Upon the whole I see nothing to distinguish, in a legal view, the condition of Americans from that of other British subjects residing in a ceded country; nothing done by the king, nothing by parliament, nothing by themselves; and it seems to me, the person in question coming to this country, is still entitled to the privileges of a natural-born subject.

Jan. 17, 1809.

January 21, 1809.

An authority is quoted for the notion of "optional domicile." It is said, that chief baron Eyre has been heard, over and over, to lay it down, that Englishmen domiciled in the United States could not be deemed British subjects, so as to navigate a British ship. There may be good reason for such an opinion. The chief baron might have considered, that, under the order of council for carrying on the American trade, (it was before statute 37 Geo. III. c. 97.) American ships were to be navigated by subjects of the United States. He might consider domiciliation as the best evidence of being an American subject. It might appear to him reasonable, that such persons being allowed to navigate American ships, as American subjects, they should not be recognised, occasionally, as British subjects, when navigating a British ship. Such a discrimination might appear to him to promote the principle of our navigation system: as no ships are allowed to be British-built, unless built in the king's dominions; it might seem to him an appropriate construction, to exclude from the character of British mariners, all those who chose to domiciliate themselves in America, then become a foreign country.

Be it so; but can they report to us, the chief baron ever laid it down, that persons who so made themselves Americans, by residing in the United States, might not afterwards be deemed British subjects, and British mariners, by changing their domi-

cile to some part of the king's dominions? Is there any thing in the principle of domiciliation, which will enable them to say, that the first choice is final, and the character thereby acquired cannot be put off? Is there not as much efficacy in a second, a third, or any other subsequent choice of domicile? And do not such persons become *toties quoties* successively British or American? And if not, why not?

If their notion is grounded on any principle, they should be able to explain to us, why the first choice of domicile precludes the advantage to be derived from any subsequent choice.

Such are the *queries* that may be put on this piece of exchequer law, confined only to the very peculiar case of navigation and of mariners. There still remains the principal *query*, why should such a construction on the navigation act, supported as it is there by the special circumstances of the case, be adopted, and made to govern in the general question of natural-born subject, where there is nothing similar to make the application of it fit or colourable? Certainly domiciliation, or residence, temporary or permanent, was never made a part of the consideration, whether a person is a natural-born subject; but simply this was the question, whether he was born within the king's allegiance? However, if domiciliation weighs any thing, the claimant, in this case, is resident here, and professes to make this kingdom his future residence. Perhaps the chief baron, upon a *habeas corpus*, would, in the case of this claimant, have deemed his present residence, and his determination declared to reside here in future, to be a sufficient choice of domicile within the principle of his exchequer decision; perhaps he might consider this case as standing on different grounds from the exchequer case, and to be decided on general principles, without regard to domiciliation.

We are so uninformed as to the extent of what the chief baron is supposed to have ruled at *nisi prius*, that it seems to afford no safe ground of reasoning.

Jan. 21, 1809.

March 22, 1809.

I have been desired, by a great lawyer, to look at the statute *de prerogativa regis*, ch. 12. *de terris Normannorum*. I suppose, he meant this should prove to me, that on king John losing Normandy, the Normans became thereby aliens, and therefore the lands holden by them in England, escheated to the king; but the

statute does not import this, nor is it so understood by Staunforde. On the contrary, Staunforde understands, that the Normans still continued English subjects, and were *ad fidem utriusque regis*. The statute expressly speaks of those who were *non ad fidem regis angliaë*, which must be such as were born after the severance of the two countries; and the design of the statute is, to fix, that the escheats, in the case of such *postnati*, accrued to the king, and not to the lord; and that the king was to grant them to be holden of the lord, by the same services, as before.

This chapter, therefore, of the statute *de prerogativa regis* is an express authority, that the severance of Normandy from the English crown did not make the inhabitants there aliens, though their children, born after the severance, were aliens.

This authority becomes also an answer to another point maintained by the same great lawyer; he goes beyond the rest that I have had to contend with, except the civilian, and he holds with the civilian, that the inhabitants of a ceded colony become thereby aliens. Yet, in this, I cannot but allow there is consistency; for the principle appears to me to be the same: those who call the Americans aliens, ought to consider the inhabitants of Florida, ceded at the same time, in the same light; and those who consider the inhabitants of Florida as not deprived of their personal rights of Englishmen, ought to admit the American claim to continue natural-born subjects.

Mar. 22, 1809.

March 24, 1809.

Perhaps the objectors have never considered the persons to whom naturalization and denization are granted. In both cases, in the act of parliament, and in the patent, the party is alleged to be born out of the king's allegiance; and in applying for either, he must allege the same in his petition; but an American cannot do this with truth. What then is to be the conclusion on the peculiar circumstances and situation of this supposed alien? Is he to be deemed an alien beyond all other aliens, that is, irredeemably such? Assuredly he is not susceptible of denization or naturalization in the ordinary course, because he cannot bring himself within the description, which alone makes him the object of such favour; or may we conclude, that, not having the defect, which is to be supplied by such grant, he is already in possession of the

character to be conferred by it; in other words, he is not an alien, but a natural-born subject?

The latter appears to me the just conclusion; and I shall accordingly say, with confidence, that there is the authority of the lord-chancellor in cases of denization, and of the two houses of parliament in cases of naturalization, for the proposition, that *birth out of the king's allegiance*, is the only circumstance which constitutes an alien. We may be sure such forms would not have been settled and constantly acted upon, if they were not known to be required by the general law of the land. Indeed, it is nothing more than the definition of alien laid down in all the books, whether elementary or practical; the following examples are sufficient:

Natural-born subjects, are such as are born within the dominion of the crown of England; that is, within the ligeance, or, as it is generally called, the allegiance of the king; and aliens, such as are born out of it.—[Blackstone, 1 book. ch. 10.]

An alien is one, who is born out of the ligeance of the king.—[Comyn's Digest. article, alien.]

An alien, is one born in a strange country.—[Bacon's Abridgement, article, alien.]

And thus I conclude this discussion, as I began it; relying upon established and known positions of law for maintaining juridical truth, against hypothesis and the speculations of political reasoning.

March 24, 1809.

NEW YORK. DISTRICT COURT, U. S.

[Property belonging to an enemy, which is brought within the territory of the other belligerent, after the declaration of war, and in ignorance of the fact, is lawful prize;—though it be in a vessel, and under the flag of the captor;—what constitutes a domicile so as to avoid the character of an alien enemy.]

Charles Johnson, on behalf of himself, officers and crew of the private armed vessel the Tickler, vs. 21 bales, 28 cases of merchandise, and 2708 bars of iron, goods and merchandise, claimed by Robert Falconer, for and on behalf of John Richardson.

VAN NESS, J. This case will first be considered as it is disclosed by the ship's papers, and the preparatory examinations, and then will be examined the defence arising out of the further proof that was ordered and produced.

It appears by the papers, that the property in question was laden on board the ship Mary and Susan, at Liverpool, in England, some time in the month of July, 1812.

That the Mary and Susan is an American registered vessel, and that she sailed from Liverpool on the 16th July, 1812, on a voyage to New York, with these goods on board, and under a charter-party to John Richardson, styling himself an *English merchant, residing in Liverpool*.

That she had a license on board, obtained from the British government, to protect her against capture by British cruisers.

That at the time of her departure information of the hostilities existing between the United States and Great Britain had not reached England.

That on the 3d September, 1812, she was captured as a prize by the privateer Tickler, and brought into the port of New York. The position in which she was taken is not ascertained with precision. It is differently stated in the preparatory examinations which have been read, varying from 18 to 30 miles south of the light-house.

It is also in evidence, that John Richardson, the person in whose behalf these goods are claimed, is a native subject of the king of Great Britain, but a naturalised citizen of the United States.

The national character of Mr. Richardson is the principal ground on which this cause must be decided; but before I proceed to consider that, to examine the effect of his naturalization here, and of his subsequent residence in England, with the explanation given of it, by the further proof which was ordered and produced, I wish to dispose of some other questions which were first raised as principal grounds of defence, in a preceding cause, and also relied on in this.

It has been insisted, that this property was confided to the faith of the government, because laden on board an American vessel before the commencement of hostilities, and proceeding to its destined port in ignorance of that event.

2d. That it was captured within the territorial waters of the United States; thus under the protection of the government, and not subject to be made prize.

3d. That it was exempt from capture, because proceeding in an American vessel; and under the American flag.

In examining the points which have been stated, it will be necessary to advert to some general principles of the law of nations. In doing this, it will not be requisite to notice particularly its divisions into *necessary, voluntary, conventional, customary or positive*. The law of nations, without defining or developing its divisions more minutely, may be stated to be the law of nature, rendered applicable to political societies, and modified, in progress of time, by the tacit or express consent, by the long established usages and written compacts of nations: usages and compacts become so general, that every civilized people ought to recognise and adopt their principles.

A principle which is deducible from natural reason, and firmly established by the primitive law of war, the general law of nations, in which is not embraced, the conventional or customary law, is,

That as soon as war is declared, all the property of the enemy or his subjects, wherever found, whether on the land or on the water, is lawful prize. This position, it is presumed, will not be contested. It is laid down in terms thus broad by all the

late as well as the early publicists. By *Grotius*, lib. 3, ch. 8 and 5. *Puffendorf*, ch. 8. *Bynkershoeck* ch. 2. *Vattel*, ch. 5. lib. 3. *Martens*, lib. 8, ch. 2.

If then, enemy property under any circumstances be exempt from the rigorous operation of this principle, the exemption must be found in the conventional or customary law. That the rigour of this fundamental law has been relaxed by the express agreement of some nations, the tacit acquiescence and consequent customs of others is freely admitted. The severity of the laws of war, and the stern exercise of many belligerent rights, have been gradually modified and ameliorated as civilization and refinement diffused their influence over the nations of the earth; national humanity has kept pace with the progress of science and religion, which gradually infused the benignity of their principles into the whole system of national intercourse. The enlarged views and intellectual improvements resulting from the one, gave efficacy to the precepts of the other, which taught all people that public, like municipal laws, were to be administered, not only in justice, but in mercy.

It was about the middle of the 17th century, that these enlightened views, were matured into a decisive and practical influence on the conduct of belligerent powers: that the ferocious and sanguinary spirit, which had uniformly distinguished national conflicts began to abate: that war became more a contest between governments, than nations, between monarchs contending for political supremacy, with objects more direct and definite, than individual calamity. The petty pillage of a town and the oppression of individuals, whom accident or the pursuit of fortune, had placed within his power, ceased to add to the laurels of the prince, or the splendor of his throne; and this new view of national honor and magnanimity, this revolution in moral feeling, produced a correspondent revolution in the practice, if not in the laws of war.

This, too, was an important epoch in the history of European commerce. Ever since the reign of Elizabeth, England had taken a conspicuous part in the politics of Europe. That active princess entered with spirit into the affairs of the continent, for the express purpose of extending the trade and commercial connexions of her kingdom. The impulse generated by her measures, continued and extended its influence through the whole of

the 17th century—and it was soon perceived, that a more liberal policy, towards each others' subjects, at the commencement of hostilities, was necessary to the safety and convenience of commercial enterprise. To all the views and feelings, therefore, resulting from the increased wisdom and refinement of the times, were added the powerful motives of direct and evident interest. That commerce might be beneficial, not only to individuals, but to the revenues of the state, it was necessary that those engaged in it should pass freely from one country to another, and dwell with safety wherever their pursuits might lead them. If, in times when princes were as capricious, when wars were as frequent quite, and undertaken for causes as trivial as at present, these excursions were to have been attended with captivity and confiscation, it is easy to perceive the evils that would inevitably interrupt the progress of the commercial system then contemplated and began.

In the progress of social improvement, therefore, we find the source of the desire to remedy these commercial embarrassments, and in that desire the proximate cause of the *practice* which now generally prevails among belligerents, of exempting from seizure the persons, and from confiscation, the effects of each others' subjects, within their respective territories, immediately on the commencement of hostilities. The form in which it first appeared, was that of giving notice to alien enemies to depart with their goods, and stipulations to this effect are first found in treaties made soon after that of *Munster* in 1647-8. During the violent and complicated wars, terminated by that convention, the property of hostile individuals, as usual, had been confiscated; but by the 24th article, restitution was agreed upon. And in the treaty made seven years afterwards between *Cromwell* and *Lewis XIV*, it was agreed, that in case of war, the merchants of the contracting powers should have six months to depart with their effects. This is the first stipulation of the kind I have found in a treaty.

I am aware that in England, some regulations favourable to the freedom of commercial pursuits had been adopted at an earlier period, as appears by the 30th chapter of *Magna Charta*, and a statute passed in the reign of *Edward III*. But these were local and municipal regulations, and failed to produce an immediate or decisive effect on the customs of Europe, although

they may have prepared the way for the treaty stipulations to which I have alluded.

Notwithstanding the precedent which had been established, and the concurring motives of interest and humanity which demanded an amelioration of the first severities of war, the safety of alien enemies, and their effects rested for a long time, exclusively, on the special stipulations of treaties. So late as the period when *Bynkershoeck* wrote, the beginning of the last century, they received no sort of favour or protection, unless there existed a treaty to that effect, between the belligerent states. Even *Vattel* recognises the relaxation of the ancient rule as a modern practice. From recent instances, and from finding the provision in question, in some of our latest treaties, it is even doubtful now, whether it has acquired the force of a national custom, and whether the confiscation of enemies' goods, in the country, at the commencement of hostilities, if not protected by treaty, would be deemed a violation of the law of nations, or a mere departure from a recent practice.

In the war in which we are now engaged, it is conceded, that the rule is to be applied, and having briefly traced its origin and progress, it remains to examine its extent.

It will appear, I think, from the authorities which must govern us, that no effects belonging to an alien enemy, but such as are *under particular circumstances, within the country* at the commencement of hostilities, has ever been deemed by the law of nations or the usages of war, under the safeguard of public faith, where special compacts do not vary the general rule. No other property is within the modification of the law. All that comes into the country subsequent to the declaration of war, is still subject to seizure and confiscation, where there is no treaty on the subject. We have none with England that can arrest or suspend the application of this principle. In the treaty between the United States and Prussia, the contracting parties stipulated, that in case of war, the subjects of each other should be allowed nine months to settle their affairs and depart with their effects; and the 26th article of the treaty of '94 with England, is somewhat similar. Both obviously relate to property, in the country at the commencement of hostilities, and therefore under the protection of the government.

In an examination of the present question, but little aid can

be derived from early writers on national law. *Grotius* and *Puffendorf* and their cotemporaries, who explain with great minuteness, the duties and obligations arising from the *primitive laws of war*, afford no light on a principle unrecognised in practice, at a period when the physical force of nations was not limited in its exercise by those rules which have since derived authority from the acquiescence of a more refined age. The exemption of enemies property from confiscation under any circumstances, formed no part of the martial policy of that day.

Bynkershoek, as has already been noticed, states in his 7th chapter, that all enemies goods *in the country* at the commencement of war, is confiscated, unless protected by treaty. In chap. 3, when treating of the suspension of commercial intercourse between enemies, he says, "it is clear that the goods of enemies brought into our country, are liable to confiscation."

Vattel confines the exemption expressly to goods *in the country* at the time war was announced. I shall give his words, for I may perhaps have occasion to make another remark upon them:

"The sovereign declaring war, can neither detain those subjects of the enemy who are *within* his dominions at the time of the declaration, *nor their effects*—they came into his country on the public faith. By permitting them to enter into his territories, and continue there, he tacitly promised them liberty and security for their return; he is therefore to allow them a reasonable time for withdrawing with their effects; and, if they stay beyond the term prescribed, he has a right to treat them as enemies—though as enemies disarmed."

This embraces all the law on the subject; for, although recognised, it is no where more distinctly stated.

Martens, more rigid in the application of the rule, says—"where there are neither treaties nor laws touching these points, nations continue still to seize on all the property belonging to their enemies' subjects which is *carried into their territories after the declaration of war*." This goes directly to the point before us—and I shall add an extract from *Chitty* to the same effect. He says, that "in strict justice, the right of seizure can take effect only on those possessions of a belligerent which have come to the hands of his adversary after the declaration of hostilities."

In another place he observes, "the prohibition of *Vattel*
No. XXI. K

reaches to the exemption only of goods in our hands, at the time of the declaration, and does not cover property coming into our territory after that declaration."

That the exemption of *Vattel* embraces only goods in the country at the rupture, is perfectly plain; and I think it open to an inquiry, whether a still more rigid rule may not be fairly extracted from the terms in which it is expressed, which is, whether not only the *property* but the *owner*, the *claimant*, must not have been *within the country before the war*, to entitle either to *governmental protection*.

Personal property follows the rights of the person. On general principles, therefore, unless the person *claiming* is entitled to protection, his property cannot be. The *persons*, according to *Vattel*, entitled to protection, are those who were in the country at the declaration of war. *They* must be permitted to return with their effects. And it seems to me, that the exemption of hostile property from seizure, is founded entirely on this *personal right*, and that this right is derived from the circumstance of having come into the country before the war, and therefore on the public faith. In common with all other general rules, this must ever be subservient to the express stipulations of a treaty. As it does not seem necessary, I shall not now examine whether such exist between the United States and Great Britain.

These remarks are only the partial result of a general investigation, and not a direct examination of the principle they embrace. They are therefore particularly open to correction.

This particular branch of the subject has been examined with some care, for the purpose of ascertaining whether there were any, and if so, what circumstances that could take enemy property, not in the country, out of the operation of the general rule, clearly established by the authorities which have been referred to; and I am constrained to say, that not a single *dictum* has been found, except that in *Azuni*, to which I shall have occasion to refer, claiming the safeguard of public faith for property not actually within our territorial limits at the commencement of the war. The inference appears to me irresistible, that no extension of the principle is intended.

It would seem to follow, then, under the rule which appears to me to be established by that public law which must control the decisions of this court, that if this must be considered ene-

my property, it is subject to capture and condemnation as prize.

Whether the result of my examinations be correct or otherwise to attempt to show, after what has been said, that the property in question is not protected because laden, and proceeding in ignorance of the war, would be superfluous and irregular. But indulging, as I do, a proper diffidence in my own opinion of the law, on a subject so novel and important, I must be permitted to fortify it, by attempting to develope, what I conceive to be the practice of other nations who profess to be governed by it.

In the doctrines held and enforced by Great Britain, we may perhaps find a satisfactory exposition of the law, in cases like this we are discussing. And if in a war with her, we adopt the construction of her own government, and the practice of her own courts, we can afford no just ground of complaint.

In examining these we shall find, not only, that the English prize courts are in the constant habit of condemning property brought in *ignorant of the war* when captured, but *property in port* at the commencement of hostilities, and even property captured before the war, but in contemplation of that event. The only difficulty and discussion that ever occurred on the subject in that country, was to whose benefit the condemnation should inure: whether to the *Lord High Admiral*, or since the abolition of that office, to the king in his *office of Admiralty*, or to him *jure coronæ*.

During the usurpation of Cromwell, the office of *Lord High Admiral*, was in various ways depressed, and its perquisites reduced. The protector found them valuable, and it became his policy and his interest, not only to engross and direct their application to unusual purposes, but to abolish the office itself.

From time immemorial, captures made from the enemy under particular circumstances, had been considered as perquisites of the Admiral, and under the name of *Droits of Admiralty*, appropriated to support the dignity and splendor of his station. The sinister policy, and distracted views of the government at this period, introduced much confusion as to the distribution of the revenue arising from these sources; and at the restoration, the distinction between *Droits of Admiralty*, and direct forfeitures to the crown, was ill understood, and but little regarded

in practice. With the regular settlement of the government, the Lord High Admiral began to claim, what had once been considered the rights and emoluments of his office, which produced much animated discussion between him and the king. The controversy was at length referred to the greatest lawyers and the ablest civilians in the kingdom. From their combined wisdom resulted an order of the *Privy Council*, which, with great apparent precision, designated the rights, and settled the conflicting pretensions of these worthy brothers.

This order in council bears date the 6th of March, 1665. As far as relates to this subject, it remains unaltered, and at this day governs the decisions and practice in the British prize courts.

Independent of all other matter, a reference to the terms of this *order* alone, will abundantly show, that property coming in, ignorant of the war, is subject in England, to seizure and confiscation.

The part of the order connected with this question, is in these words:—

“ All ships and goods belonging to enemies, coming into any port, creek or road, of his majesty’s kingdom, of England or of Ireland, by stress of weather, or other accident, or by mistake of port, or by ignorance not knowing of the war, do belong to the Lord High Admiral.”

Enemy’s ships and goods, then, coming into a port, creek or road, *not knowing of the war*, are condemned to the Admiral. But the coming in, must be *voluntary*, unconnected, at least, with any circumstances resulting from the war, to constitute a *Droit* of admiralty. But what if it be not so? The answer of Sir William Scott is plain.

“ When vessels come in not under any motive arising out of the occasions of war, but from distress of weather or want of provisions, or from ignorance of war, and *are seized in port*, they belong to the *Lord High Admiral*. But where the hand of violence has been exercised upon them, where it arises from acts connected with war, &c. they belong to the crown.”

Thus far, then, we have an exposition of this order, and therefore of the British practice, which is still regulated by it, showing, conclusively, that ignorance of the war does not avert a forfeiture, and that under this part of the order these goods

would not be *droits of admiralty*, because the hand of violence has been upon them; because her coming in, arose from acts connected with war.

A practical illustration of those principles will be found in the arguments of counsel and judgments of the court, in the cases of the *Danckebaar African*, the *Herstelder*, and the *Rebecca*, in 1 Robinson, and the *Maria Francaise*, in 6 Robinson—all these vessels, I believe, were captured in ignorance of the war.

The word "*coming*," Browne says, in his "*Civil and Admiralty Law*," is worthy of attention; and so indeed it is, in an English prize court. He goes on to say, in the words of Sir William Scott, extracted verbatim from the case of the *Rebecca*, "it has, by usage, been construed to include ships and goods, *already come* into ports, creeks or roads," &c. and in consequence of this construction he adds, "all vessels detained in port, and found there at the breaking out of hostilities are condemned *jure corone* to the king.

This practice of condemning vessels in port, at the breaking out of hostilities, is founded exclusively on this strange construction of the order; and it is remarkable enough, that they are condemned *jure corone* to the king. The claim of the admiral is defeated, I presume, by the circumstance that they were *not enemy's vessels* when they came in, as he is entitled only to *enemy's vessels* coming in.

Another part of the order is, "All such ships as shall be seized in any of the ports, creeks or roads of this kingdom, or of Ireland, *before any declaration of war* or reprisal by his majesty, do belong unto his majesty."

Under this is probably sanctioned the condemnation of property detained by embargo, before war is declared; and hence, also, property captured before the war, under whatever pretence or mistaken motive, will be condemned if hostilities commence before the adjudication. Sir William Scott says, that "the person claiming, must not only be entitled to restitution *at the time of seizure*, but he must be *in a capacity to claim* at the time of adjudication." This, at first view, would seem to be at variance with the general rule or practice already assented to, that property in the country is not liable to confiscation. But the reason of the distinction no doubt is, that the property thus situated came in by coercion, and furnishes conclusive evidence that the

rule exempting hostile property from confiscation, must be strictly construed; that under the diversified circumstances and various situations in which it may be placed and captured, the public faith is only pledged for the protection of that, which was *not only in the power* of the adversary, but had been *voluntarily* brought within his territory, and placed within his power, before the commencement of hostilities.

Thus, then, I think it appears, where there is no reciprocal agreement to prevent it, that property is condemned in England, although captured in ignorance of the war, or lying at liberty in port at the commencement of hostilities, or in any way seized or detained *before* the declaration of war.

In opposition to this practice, and to what I conceive to be the clear and established laws of war in such cases, a passage from Azuni has been cited in these words.

“A merchant vessel that happens to be at sea, when the nation to which it belongs enters into a war, cannot be captured on its arriving at an enemy’s port in right of the war which has supervened between the two nations. He ought then to be under the safeguard of the public faith.”

What he *ought* to be, and what he is *allowed* to be, by the usages and customs of nations, are very different things. Each of us might in our closets devise many humane and beneficial modifications of the laws of war; but to what purpose? The whims and reveries of authors do not govern nations at this day; it requires the sanction of the civilised world to invest them with the force and authority of laws.

The passage is remarkable, because it has neither the opinion of any publicist, nor the practice of any nation to support it. It is true he refers to two treaties for a recognition of this principle, and two individual instances of personal magnanimity. The one extracted from a French newspaper. On this authority he has announced a new law to belligerent nations. Surely the provisions of two treaties, are not binding on nations not parties to them, nor can personal magnanimity, establish a rule for the government of the world.

This principle of Azuni has not yet, and I will venture to predict never will, become part of the law of nations, and it never ought, if wars are, as they should be, commenced only for just causes and with legitimate views.

The end of a just war is to obtain a remuneration for some loss sustained or injury received; and after announcing to the world, that force will be employed to obtain that which is withheld, can it be necessary in every individual case of attack, to send a herald to proclaim your intention, that your adversary may be prepared to resist. Thus hazarding a loss equal to that which it is sought to repair.

On a careful perusal of the work in which this doctrine is advanced, I think it will be found that to whatever consideration it may be entitled as a work of ingenuity and research, it is unworthy of much weight as an authority. It was produced, if not under the dictation of a distracted government, yet in some degree for the purpose of supporting the alterations it proposed in the maritime laws of nations, and under the operation of prejudices too strong to admit of an impartial examination of a national question.

It was obviously written, under the innovating influence of the times; at a period, when the inflamed passions of men, and the convulsed energies of nations, were uprooting the foundations of social and political order. When new systems of policy, of municipal and of public law, were every where springing up with a luxuriance that threatened to confound all established principles, and perplexed the soundest understandings. When intellectual efforts were perverted, by the captivating novelties and splendid plausibilities, engendered "in that season of fulness, which opened" upon the world with the French revolution. When changes and innovations, eccentric in their nature, and infinitely various in their character, overwhelmed every system of ethics and philosophy, which laborious wisdom had devised, or time consecrated. Absorbed or dissipated all that was fantastic in superstition, or venerable in orthodox opinion, while the victorious Eagles of a phrenzied people, indiscriminately overshadowed or subverted all the monuments of human folly, and all that remained of ancient grandeur. From sources so agitated, if not polluted, nothing satisfactory can be drawn. The oracles of wisdom are seldom uttered amidst scenes of tumult and commotion. We must look back beyond the troubles of these latter days for wise rules, and trace their modifications and present form, through the acknowledged and uniform practice of

settled and civilised nations. *That* is at variance with this novel suggestion, and it cannot be admitted on an authority so questionable.

It is alleged—

2dly. That this property was captured within the territorial waters of the United States, *and therefore not subject to be made prize.*

There is something so novel in this position, and in the arguments which it has suggested, that it is difficult to reduce them to a systematic examination.

It would be easy to explain the foundation of the jurisdictional right of every nation, to those portions of the sea that wash its shores. To show that the source from which it is derived is self-preservation. That this sovereignty is assumed by, and concede to each, for the preservation of its own peace, to avoid the evils that may result from a warfare between others, prosecuted within its immediate vicinity. But whatever may have been the origin of this claim, or by whatever reasons sustained, the precise *nature* of this sovereignty is involved in some obscurity. It will, however, be unnecessary to investigate that minutely, in order to explain the difficulty which the argument on this branch of the subject was intended to present. By examining the constitution of the admiralty and prize courts, and the power derived to the captors by the prize commission, it will become obvious that it has no connexion at all with the general question of prize—that it affords protection under particular circumstances to a friend, never to an enemy—that it is an appendage (if I may use the term) to a *neutral* territory—but does not, and cannot exist between belligerents.

The common admiralty jurisdiction (as *Comyn* calls it) extends to all things done *super altum mare*. The prize jurisdiction is not thus limited. It embraces the whole question of prize, unrestrained by the locality of the capture: it takes cognizance of all captures, no matter where made, if made *as prize*. The *validity* of the capture depends on the "*jus belli*" as determined by the law of nations. The effect and *ultimate direction* of the forfeiture depends on the rights granted by the terms of the commission, as explained by legal definitions, and recognized by universal usage.

What, then, does the prize commission grant?

To make captures of enemy goods on the *high seas*, limiting the power intended to be conveyed, by the very terms that limit the common admiralty jurisdiction. By ascertaining the extent of that jurisdiction, we must necessarily discover, what is meant by the *high seas*, and thus the interest derived from this capture.

Wood gives the answer of the judges of the realm, to the complaints of the admiral concerning prohibitions granted by the common law courts. In different places, they say, "by the laws of this realm, the court of the admiral has no cognizance or jurisdiction of any manner of contract, plea, &c. *within any county* of the realm, either upon the land or the water. It is not material whether the place be upon the water, *infra fluxum et refluxum aqua*, but whether it be upon any water, *within any county*," "taking that to be the sea, wherein the admiral hath jurisdiction, which is before by law described to be out of any county."

Comyn says, "the admiralty has jurisdiction in matters on the *main sea*, or coasts of the sea, not being part of the body of any county. And if it be between high and low water mark when the sea flows; for then it is *super altum mare*, though upon the reflux it be *infra corpus comitatus*."

The admiralty, then, has jurisdiction on all waters, not *infra corpus comitatus*; and how is it given? by the very terms contained in this commission. All waters, therefore, not comprehended within the body of a county, constitute a part of the *high sea*: unless it can be shown, then, that this capture was made within the limits of a county, it was well made, and vests an interest in the captors.

In analogy to the British practice, it has been contended, that by reason of the locality of the capture, the forfeiture must go to the government, in the nature of a *droit of admiralty*, because included, I presume, in the terms of the British order, which gives a direction to the forfeiture. But we have neither *droits of admiralty*, nor such an order; the whole subject must be regulated by the commission and instructions. We can only discover what has been reserved to the government, by ascertaining what has been granted. They have authorised captures on the *high seas*, which I think has been shown, to include the spot where this capture was made.

If even we had *droits of admiralty*, and an exact copy of that order in force here, still the forfeiture would go to the captors. The place of capture is not embraced by either of the terms used in it, as appears clearly in 2 Brown 61, and by the exposition given of them by Sir William Scott in 1 Rob. 194.

It is insisted—

3dly. That this property is exempt from capture, because proceeding in an American vessel, and under the American flag.

This objection would seem to be sufficiently answered by the principles already laid down. The same rules that explain the admiralty jurisdiction, and designate the limits between it, and the common law jurisdiction, must determine what, under the law of nations, is to be considered *in the territory*, so as to exempt it from capture.—It must be within the common law jurisdiction, within the body of a county.

The notion that vessels must be considered as part of the territory of a nation, is antiquated and exploded. The most strenuous advocates for the *freedom of goods in free ships*, no longer place the controversy on that ground.

The principle first formally promulgated in the *Consolato del mare* about the 12th century, that enemy property was good prize on board free ships, has certainly been contested at different periods. It has sometimes been admitted and rejected by the same and different nations: but the high authority of that celebrated code, has generally prevailed where treaty stipulations did not establish a different rule. Within our own times it has been attempted with great force and with much spirit, to establish a different principle, but it was lost with the scattered fragments of the armed neutrality.

Amidst the uproar of the world, the flag too, has dwindled into a vain emblem of sovereignty, protecting nothing; nothing certainly but the vessel, and designating only to what portion of the globe she belongs. These are the principles of England. They were recognised by our government in its correspondence with the French minister in the year 1793, and I am not prepared to deny that they are founded in reason.

The additional instructions issued by the president, have been relied on as a ground of defence. These instructions were prepared and dated at the city of Washington, the 26th August.

On the 29th they were known here. The privateer Tickler was then at sea, and there is no evidence at all to show, that she had a knowledge of them at the time this capture was made, to wit, the 3d September. Indeed all presumption is against it. Considering, then, the captain of this privateer as ignorant of these instructions, and under the circumstances of the case, he must be so considered, I am of opinion, that they could have no effect or operation on his conduct. There is a material difference between acting in ignorance of a supreme legislative act and of executive orders. The one affords no impunity to the commission of a crime: the publication of a law enacted by the known public authority of the country, which operates upon every member of the community, is the only notice, which, in the nature of things, can be given of it. A knowledge of it must be presumed *ex necessitate*, from the impossibility of giving to it farther publicity. But a private executive instruction, for the government of a certain class of public agents, can be made known to them in a different manner, and must be so, before they can be governed by it. In short, the one is a public, the other a private instrument. Ignorance of the one cannot be alleged, but the other cannot be obeyed unless known. A law operates until repealed with the same solemnity with which it was enacted. An instruction must be obeyed, until revoked with the same formality with which it was given. The original instruction was given and communicated to the commanders of these vessels, and another intended to annul or supersede it, must be given and communicated to them in like manner to produce that effect; until then the first instruction is their only rule of action.

Again—this is a warlike operation. Considering, then, these instructions of the president in a military point of view, is not every act done under the one legal and effectual until another is communicated? If the libellants had been instructed to capture property of this description, would they not have been bound to do so, until an order interdicting it, was received?

The case has been likened to captures made after a treaty of peace signed; but there is not the least similitude. To capture enemy property is a right of war. If there be no war, there can be no capture. The right to capture is during war, and is extinguished with it, *eo instante*. Some publicists have contended,

even that a capture is good till notice of peace received—But that is exploded.

I am clearly of opinion, therefore, that these instructions can have no weight under the circumstances of this case.

But suppose, for a moment, that they were to have effect—that they were known, or though not known, that still they were binding. That, it seems to me, would only raise a question between the government and the captors. If this be enemy property, this court would not restore it. If the captors have no claim, it would be condemned to the government.

But from the best view I am able to take of these additional instructions, it appears to me, that they were not intended to touch the case of enemy property. It is well known, that at the commencement of the war, American vessels, laden in most cases with American property, were molested and captured by privateers, with a view to a condemnation, on the ground of being engaged in an illegal trade with the enemy. As these vessels sailed in ignorance of the war, the government thought, that under all the circumstances of the case, they were entitled to consideration and lenity. These instructions, then, were issued to protect American vessels and American property from molestation before their arrival, without intending, in my judgment, to interfere with the question of prize in relation to enemy property. If it were otherwise, it would present the case of the executive abrogating, not only a right already vested by law, but one which is universally given and recognised in modern warfare—to capture enemy property on the high seas; and a proceeding resulting in nothing but drawing the forfeiture to the government; thus frustrating the very objects which had led these people to this species of warfare; to capture hostile property within the limits prescribed by their commission. I cannot give to these orders a construction that will lead to this conclusion.

The last question to be considered is—

Whether Mr. Richardson, in whose behalf this property is claimed, is, for the purposes of this proceeding, entitled to all the rights and immunities of an American citizen.

In the prosecution of this inquiry, I shall not stop to examine whether a naturalization, obtained for *special* and *temporary*, and not for *general* and *permanent* purposes, can be valid and

effectual? Whether a government is bound, under any circumstances, to protect a citizen or subject, who not only withdraws voluntarily from the performance of every duty, but who, for nearly "twice the period that ordinary calculation assigns to the continuance of human life," incorporates himself and his resources with the numbers and the wealth of another nation? These, in my judgment, are questions well worthy of consideration, and less easy of solution than seems to be apprehended. But, as I have already exceeded the limits usually observed on occasions of this sort, I shall wave their discussion now, and notice only the more limited difficulties suggested by the course of the argument.

The facts relative to Mr. Richardson's naturalization here, and residence abroad, as disclosed by the further proof which was ordered, are these:

It appears that he was naturalized as a citizen of the United States, in the year 1795, according to the laws then in force on that subject; that in 1797 he went to England; that in 1799 he came again to this country, and returned to England in 1800—where he continued to reside till March, 1813, making a residence of 16 years in England, with the exception of a visit to this country of a few months. The effect of that will presently be noticed.

It is contended by the captors that this residence constitutes a domicil under the law of nations. A commercial residence, within the principles of prize law, investing the claimant with all the characteristics of a *British trader*, and involving him in all the consequences, and all the evils incident to that character.

I think it may be assumed as a principle, that the law of nations, without regarding the municipal regulations prescribed for his admission, views every man as a member of the society in which he is found. Residence is *prima facie* evidence of national character; susceptible, however, at all times, of explanation. If it be for a special purpose, and transient in its nature, it shall not destroy the original or prior national character. But if it be taken up *animus manendi*, with the intention of remaining, then it becomes a *domicil*, superadding to the *original* or *prior* character, the rights and privileges, as well as the disabilities and penalties of a citizen or subject of the country in which the residence is established.

“The domicile,” says *Vattel*, “is the habitation fixed in any place with an intention of always staying there. A man does not then establish his domicile in any place, unless he makes sufficiently known his intention of fixing there, either *tacitly*, or by an express declaration!”

Again—“The *natural* or *original* domicile is that given us by birth, where our father had his; and we are considered as retaining it, till we have abandoned it in order to choose another. The domicile *acquired*, is that where we settle by our own choice.”

This is the general principle, determining the national character solely by the domicile, whether natural or acquired. As the *original domicile* is given by birth, it requires no explanation. But what shall constitute an *acquired* domicile?

Although the definition given of it, appears at first view, sufficiently plain, yet in analyzing it, we have soon to encounter an important difficulty. When shall the intention to remain be deemed to exist? If it be not openly declared, when, as *Vattel* expresses it, shall it be deemed to be tacitly made known? What shall be evidence of the *animus manendi* and determine the intention?

In order to ascertain this, we must resort to the exposition of able magistrates, whose duty it has been to expound and apply this public law; we must descend into an examination of the judgments and official acts of tribunals sitting and deciding under the law of nations.

It has been contended that the practical illustration of this doctrine, derived from the course and practice of the prize courts, justifies the following conclusions:

1st. That no residence establishes a domicile to any hostile purpose, or operating a condemnation of goods, but that which is either taken up or continued after the commencement of hostilities.

2d. That on the breaking out of war, a citizen or subject of one belligerent country, has a right to return from the other, and bring with him, or withdraw from thence, his goods and effects.

I think the consideration of these propositions will embrace all the arguments, and lead to an examination of all the authorities which are in any way applicable to the merits of this cause.

It must be remembered, that the principle laid down by *Vattel* is general, and must be universal in its application. It has no relation whatever, to either a state of war or peace. The different authorities which have been cited, must all be examined with a reference to that.

The most general view which has been taken of this subject by, sir Wm. Scott, is in the case of the *Harmony*, 2 Rob. 266.

“Of the few principles,” he says, “that can be laid down generally, I may venture to hold, that time is the grand ingredient in constituting domicil. I think that hardly enough is attributed to its effects; in most cases it is unavoidably conclusive; it is not unfrequently said, that if a person comes only for a special purpose, *that* shall not fix a domicil. This is not to be taken in an unqualified latitude, and without some respect had to the time which such a purpose may or shall occupy; for if the purpose be of a nature that may, probably, or does actually detain the person for a great length of time, I cannot but think that a general residence might grow upon the special purpose. That against such a long residence, the plea of an original, special purpose could not be averred; it must be inferred, in such a case, that other purposes forced themselves upon him, and mixed themselves with his original design, and impressed upon him the character of the country where he resided.”

Surely, if terms can be explicit, and language can be plain, this is so. There is in it not the least allusion to a state of hostilities, or to a belligerent country. The terms are as comprehensive as those of *Vattel*—Showing, that residence alone, wherever it may be, is the source and foundation of *domicil*, and that from the *length* of the residence is derived the evidence of an intention to remain. If this be not so, why is *time* the grand ingredient in constituting domicil? If residence in a hostile country were necessary, *that* would be the *grand ingredient*; the characteristic feature in this acquired character, which works a forfeiture of goods.

But it is said, that the further remarks of this great authority in the same case, furnish an inference unfavourable to the opinion I have expressed.

“Suppose a man comes into a belligerent country, at or before the beginning of a war; it is certainly reasonable not to

bind him too soon, to an acquired character, and to allow him a fair time to disengage himself."

From this I should draw an argument directly the reverse of that which it has been cited to support—why is it too soon to bind *him* to an acquired character, who comes into a belligerent country at or before the beginning of a war? Most assuredly because he had not, by a residence previous to the war, established a *domicil*, or manifested his intention to remain. His residence had been too short to afford evidence of a determination to fix his habitation there. He shall, therefore, be permitted to make his election, to retire, and be allowed a fair time to disengage himself. If this claimant had arrived in England at, or immediately preceding the war, we would have had a very different case to examine.

Sir William Scott proceeds. "In proof of the efficacy of mere time, it is not impertinent to remark, that the same quantity of business, which would not fix a domicil in a certain space of time, would nevertheless have that effect, if distributed over a larger space of time. Suppose an American comes to Europe, with six temporary cargoes, of which he had the present care and management, meaning to return to America immediately; they would form a different case from that of the same American, coming to any particular country of Europe, with one cargo, and fixing himself there, to receive five remaining cargoes, one in each year successively. I repeat, that time is the great agent in this matter; it is to be taken in a compound ratio, of the time and the occupation, with a great preponderance on the article of time: be the occupation what it may, it cannot happen, but with few exceptions, that mere length of time shall not constitute a domicil."

He here supposes an American to go to *Europe*—not to any particular hostile country, and to remain for five years, intimating distinctly, that it would fix on him, the national character of the country in which he was thus established.

It appears also, from the same case, that one of the *Murrays* was considered by the common law of England, as a *British trader*, subject to the bankrupt laws of that kingdom. How a British trader? Hostilities did not exist then between that country and this. He had acquired, therefore, the character of a *British trader*, by a residence in time of peace. It is that character that

brought him within the operation of these local laws, and that character that would work a condemnation of his property in the prize courts of a nation at war with England.

This case is so replete with information on this subject, that I shall notice one other passage, found in the judgment of the court.

“Time, I have said, is a great agent in those matters, and I should have been glad to have heard any instance quoted, on the part of Mr. Murray, in which a residence of four years, connected with a former residence, was deemed capable of *any explanation*.”

It is true, that the residence of the claimant, in that case, was in a hostile country; but it is equally true, that in the passages to which I have referred, the court lays down the general principle, without any reference whatever to the fact, as is obvious from the context, and his general reasoning on the subject.

The case of the *Indian Chief*, 3 Rob. p. 17. affords much light on this question. This vessel was seized in a British port where she came for orders, on a voyage from an enemy colony to Ham-burgh. The claimant was a native American, and the court, after stating *that fact*, says:—

“He came, however, to this country in 1783, and engaged in trade, and has resided in this country till 1797—*during that period* he was undoubtedly to be considered as an *English trader*; for no position is more established than this, that if a person *goes into another country and engages in trade, and resides there*, he is by the law of nations, to be considered as a merchant of that country; I should therefore have no doubt in pronouncing that Mr. Johnson was to be considered as a merchant of this country, at the time of the sailing of this vessel on her outward voyage.”

The vessel sailed in 1795. The residence in this case was 12 years.

In the case of Mr. Miller, the claimant of the cargo of this vessel, the principle under consideration was applied with great rigor.

He was an American citizen and American consul, resident in some of the remote possessions of Great Britain, in India. He was for that reason pronounced by the court of admiralty, a *British merchant*, and his property condemned for being engaged in a trade prohibited to British subjects.

It is very manifest, therefore, that foreigners, who reside in Great Britain and enter into trade, are considered by the government and courts of that country, in pursuance of the general principle of the law of nations, as British merchants, entitled to all the privileges, and subject to all the restrictions of the native merchants, of that kingdom.

It also appears from other cases, that the principle is impartially and universally applied. That their *own subjects*, when settled abroad, are allowed all the benefits, and held to all the restraints of the native subjects of the country in which they reside. If resident in a neutral country, they are treated as neutral merchants, and may trade freely, even with the enemies of their native land.

This general rule, is given by Sir William Scott in the case of the *Emanuel*, 1 Rob. 249.

“The general rule is, that a person living, *bona fide*, in a neutral country, is fully entitled to carry on a trade to the same extent, as the native merchants of the country in which he resides.”

In the case of the *Dree Gebroeders*, 4th Rob. 191, and the *Adriana*, 1 Rob. 163, the rule is exemplified. Grant and Boland, the respective claimants, were both native subjects of Great Britain, claiming the American character. It does not appear that they were ever naturalized in this country. The court makes no allusion to that circumstance, with the view, no doubt, if the fact were so, to avoid discussing the question of naturalization. He examines nothing but their residence, and admits, that if they had sufficiently proved it to have been in this country, they would have been entitled to a neutral character.

In the case of *La Virginie*, 5 Rob. 91, a Frenchman claimed the benefit of the American character, and it is fully admitted by the court, that if he had sufficiently made out his residence to have been in this country, he would have been entitled to restoration as a neutral.

So it has been decided, even by the lords on appeal, that a British-born subject, resident at Lisbon, acquires by that circumstance, the Portuguese character, and can trade with impunity with the enemies of England. And it would seem, by a recent decision, that the same rights are allowed to British sub-

jects resident in this country. There are a great variety of cases as well in the common law books, as in the admiralty decisions, which have a bearing in point of principle on this question; but it cannot be necessary, nor is it now convenient, to analyse them all. From all I think it appears very conclusively, that residence gives national character, independent of the political state or condition of the country in which it is established. Whether the *native* country, or the *adopted* country, be at war or peace, is perfectly immaterial. By *residence*, neutrals become belligerents, and belligerents neutrals.

But the question constantly recurs; what is, what constitutes this residence? And it certainly is not easy to answer it with precision. It must be such a residence, however, as will stop the party from saying, that he came for a special or temporary purpose, such as will fix upon him the *animus manendi* the intention to remain. The residence itself, as I have said, is *prima facie* evidence of the intention; if continued it becomes in process of time conclusive. In the case of the *Indian Chief*, 12 years was decided to have that effect. In the case of the *Emden*, 10 years was said to fix the national character. In that of the *Harmony*, 4 years was declared not susceptible of explanation.

In this case there has been a residence of 16 years, with the exception of a visit to this country. It is well established that a temporary excursion, either to the place of the *original domicil*, or to any other, shall not be deemed to interrupt the residence; the time previous to the absence shall attach to that subsequent, and constitute a continued residence.

But taking the time most favorable to the claimant, there is an uninterrupted residence of 13 years, which, in my judgment, is unavoidably conclusive.

In this case, most especially. Mr. Richardson is a native British subject, and the same authority, so often quoted, says—"It is always to be remembered, that the native character easily reverts; and that it requires fewer circumstances to constitute domicil in the case of a native subject, than to impress the national character on one who is originally of another country." *La Virginie*, 5 Rob. 91.

This rule applies here with great force. It does not appear, from any evidence that has been produced, that Mr. R. was re-

cognized in England as a citizen of America; and upon the general principles held by the government of that country, we must presume, that he mingled again with the mass of its population, as a legitimate, complete British subject, enjoying all the rights and advantages of that character without being subject to any of the restrictions and inconveniences of an American citizen. It does not appear that even after the war, he was, by himself, or by others, considered liable to the ordinary evils incident to the citizens of a hostile country.

There may be other evidence of the intention than that which mere length of residence affords. The intention may be openly declared, publicly made known, and *that* however short the residence may be, shall establish the *domicil*.

Whitehill had been but two days in the enemy country when war was declared; but he had previously avowed his intention to remain, and his property was condemned.

It has been alleged that Mr. Richardson was established in Liverpool as a commission merchant only, and that he was not engaged in general commerce: that is wholly immaterial—*quoad* this shipment, he can only be recognized as a merchant; his domicile is established, and this transaction imparts to it a commercial character.

Having endeavoured to show how a domicile is established—how a foreign commercial character is acquired, it will be proper to inquire how it is divested; how a citizen of one country can disengage himself and his property from the effects and consequences of a residence established in another; and this brings me to an examination of the last point which I have proposed to consider.

It is insisted that Mr. Richardson, being a naturalized citizen of the United States, had a right to withdraw his property from the hostile country.

As a general proposition, I think this cannot be maintained: it is by no means clear, that a citizen or subject of one belligerent can, *stricti juris*, withdraw any thing from the territories of the other. It is no doubt true, that *bona fide* cases of this kind are treated with indulgence; and that, from motives of public policy, the general principles of the laws of war, are not unfrequently relaxed and accommodated to the sufferings and peculiar circumstances of individuals. But it is of no use to discuss

the principle, unless the facts disclosed can bring the case within it.

It is both proved and admitted, that this property was shipped before the declaration of war was known to the claimant, and it is difficult to conceive how property can be claimed here as *withdrawn* from the hostile country, when it was sent before the claimant knew that the respective nations were at war. This difficulty is increased by the full proof before the court, that these goods were shipped for sales and returns. They were not sent to remain here, and wait the arrival of the owner. It is clearly established by the papers, that they were to be sold as soon as might be convenient, and the avails remitted to him in England. All expectation of success, therefore, from this source must certainly be ill founded.

It is further urged, that Mr. Richardson's affidavit and others, offered as further proof, show that he intended to return to this country. The affidavits which have been produced to this point, are those of Robert Falkner, James Mills, and John Sill. Their affidavits go to shew, that Mr. Richardson, while in England, at different times expressed an intention to return to America, *if the orders in council, complained of by this country, were not repealed, and the commercial intercourse between the two countries restored*. Mr. Richardson himself, deposes that *he did make these declarations, and did entertain that intention*.

These facts are well proved, and the claimant is entitled to the full benefit of them. But however distinctly these declarations were made and repeated, and however earnest and decisive that intention may have been, I hold, on the authority of the judgment in the case of the President and many others, that it is perfectly immaterial and unavailing in a prize court.

"A mere *intention* to remove," said Sir William Scott, "has never been held sufficient, without some *overt act*, being merely an intention, residing secretly and undistinguishably in the breast of the party, and liable to be revoked every hour. The expressions of the letter in which this intention is said to be found, are, I observe, very weak and general, of an intention merely *in futuro*. Were they even much stronger than they are, they would not be sufficient; something more than mere verbal declaration; some solid fact, showing that the party is in the act of withdrawing, has always been held necessary in such cases." 5 Rob. 250.

Besides, the intention which was entertained, rested wholly on a *contingency*, the alternative of which might instantly have obliterated this impression from his mind, and produced a determination not to return. This, in fact, must have been the state of the claimant's mind at the moment this shipment was made. He knew not of the war, and the only assigned cause for his intention to return to America was removed. In his opinion the orders in council were *so revoked*, that the usual commercial intercourse between the two countries would be soon restored. Under that supposition these goods were shipped, and from his own showing, therefore, I am not only authorised, but bound to presume, that the intention to return to this country did not at that moment exist.

But if it had so existed, the judgment in the case of the *Indian Chief*, 3 Rob. 24, shows how insufficient and ineffectual it is considered in the prize courts of England. It is there most decisively stated—that the character acquired by *residence*, ceases only by *non-residence*—that it ceases only from the time the party turns his back on the country where he has resided, on his way to his own—that it adheres to him till the moment he puts himself in motion, *bona fide* to quit the country of his residence, *sine animo revertendi*. The vessel, in that case, was the property of a Mr. Johnson, a native American, but who had for some time resided in England. She was seized as being engaged in a trade with the enemies of England. The court distinctly determined, that if Johnson had remained in England till the time of seizure, she would have been condemned as the property of a British merchant; but as he had left the country on his way to America, he must be deemed to be in pursuit of, and to have revived his native character—and for that reason only she was restored.

So in the case of *Curtissos*.—He had been resident in an enemy colony, but had left it before the capture of his property, and was actually on his way home. The lords, on appeal, decided, that as he had put himself in motion towards his own country, as he was *in itinere* he was entitled to restitution. There are other decisions of these distinguished authorities, showing, that the character which residence gives, can only be *divested* by an actual departure from the country in which it is established, or at least some act that may be deemed an actual commencement

of his movement from it, and a real substantial effort to regain his native or prior domicile. The principle of these decisions I shall adopt in this case, because I think it founded in good sense, and furnishing the only *practicable* application of a rule, intended to ameliorate the strict laws of war. If the rule be not thus restricted, and thus applied, there will be no end to alleged intentions of returning. If a previously declared intention is to justify exportations from the enemy country, in every dubious state of things, they will always be made in anticipation of possible consequences, and speculative projects, leading to a long continued intercourse, the evils of which cannot be foreseen, and which it would certainly be destructive to tolerate.

It is said, that Mr. Richardson *executed* the intention he had expressed, by returning to this country. As he has returned, he is certainly now entitled to the benefit of it; but it cannot have a retrospective operation. Having acquired and established the character of a British trader, it adhered to him until he did return.

It is also said, and I admit, that a person in a foreign country, at the commencement of hostilities, may elect to return or remain abroad; but surely that election must be made known. How can it be disclosed? What shall be evidence of his election? We have seen that a mere declaration of his intention to return is insufficient. I should presume, that a continuation in the foreign country, is the most conclusive evidence that can be furnished of his election to remain, and in the nature of things nothing can be legal and conclusive evidence of his election to return, but an attempt to carry that election into effect. In every act done to effectuate that, he shall be protected. While he remains, the presumption of law is against him, and can only be repelled by the commencement of his return. He cannot remain in the hostile country sending out as many goods as may suit his convenience, and then claim them, upon the ground of a previously declared intention to return. The shipment and his return, must be cotemporaneous acts, or so nearly connected in point of time, as substantially to form but one transaction. It is evident from the facts in the case, that at the time this shipment was made, Mr. Richardson was not in pursuit of his American character. This, then, was an act done as a *British trader*, and cannot be otherwise considered.

Mr. Richardson, moreover, did not leave England till 7 or 8 months after the capture of the *Mary* and *Susan*, and his return is now fairly open to the suggestion, that it was produced by the capture of his property. Upon principle, therefore, and upon authority too, it is not entitled to consideration, and must be laid entirely out of the case.

I perceive the necessity of closing this opinion without adverting to a few other topics which the argument presented. I have already been too diffusive, for which the nature of the cause, it is hoped, will be deemed a sufficient apology. I was duly impressed with its novelty and importance, and have felt a solicitude amidst the pressure of other business, to manifest at least a *desire* to arrive at a just conclusion. That which has been pronounced, has been resisted with all the feelings that human misfortune and individual calamity are calculated to produce; but it has been forced upon me by what I conceive to be clear and explicit, though rigorous, rules of law, which imperiously demand the suppression of all personal sympathies. I have, however, the consolation to know, that if injustice has been done, relief will be administered in another place, where the skill and profound researches of the judge, cannot fail to detect and correct my error.

For the Libellants—D. S. Jones, Griffin, Wells and Emmet.
For the Respondent—Colden, D. B. Ogden and Harrison.

NEW YORK. DISTRICT COURT, U. S.

Charles Johnson, on behalf of himself, owners, officers and crew of the private armed vessel called the Tickler, against thirteen bales and thirteen cases of goods and merchandise, found on board the ship Mary and Susan, Josiah Wilson, master: William Falconer claimant of nine bales of merchandise, in behalf of James Beswicke and son.

[Alien enemies, comfiorant in their own country, cannot maintain any action, in the country of the belligerent, either in the common law courts, nor in those which proceed according to the law of nations and of war.]

VAN NESS, J. By the title of this cause, it appears that the libellants in this, were the same as in the preceding case, and that the goods libelled were also found and captured on board the Mary and Susan, which renders it unnecessary to repeat here, the allegation in the libel and claim.

The principal question which was presented for the consideration of the court, in this case, was, whether an alien enemy, under any and what circumstances, could be heard in the prize court.

OPINION.

IT is contended by the libellants, that James Beswicke and son are *alien enemies*, and that this appears,

1. By the pleadings.

2. By the papers found on board the captured vessel.

By the pleadings, because it is alleged in the libel, and not denied in the claim. I am of opinion that the allegation in the libel is sufficiently plain and explicit. That it is a material one, forming the very foundation of this proceeding, and that according to all known rules of pleading, the main fact which sustains the prosecution, must, if it can, be denied, or it will be taken as admitted. That this allegation is material and ought to be denied, the case of the Beurse Van Koningberg, is a direct and positive

authority. 2 Rob. 142. It shows conclusively, that enemy's interest must always be denied in the claim.

But aside from this, I think the fact sufficiently proved by the papers found on board, and now before the court.

The letters of Beswicke and son, leave no doubt that they are British subjects residing in Saddleworth, England. And if they did; that from Blackstock to Hugh Auchincloss, would remove it. Being satisfied on that subject, it is unnecessary to determine how far their residence alone would invest them with a hostile character, as to this transaction. It is a question on which much may be said in other cases, and I have deemed it most expedient to avoid an examination of it, in one that does not require it.

In order to dispose of all the objections arising out of the form of the pleadings, I will, while on this part of the case, notice another raised by the counsel of the claimant, though in a late stage of the argument.

It is urged, that the libel should not only allege that the claimants are *alien enemies*, but, that they are *alien enemies resident abroad*.

It is very plain, that both the libel and claim, in this case, are inaccurately and loosely drawn.

But it appears to me, that whether it be alleged or not, if the claimants be admitted or proved to be *alien enemies*, they must be presumed and taken to be in the *ordinary and usual situation of alien enemies*, to wit, in their own country; at any rate, out of this.

They cannot be *here*, without a *letter of safe conduct*, or by permission of the government. Once acknowledged to be alien enemies they cannot be *presumed* to be here and to have, that *letter* or that permission. That presumption would be unnatural and violent. If they have either, they ought to show it, if they mean to make it the foundation on which to assert a right, or to claim a privilege. On general principles as enemies, they have no rights, no privileges, and if they mean to be exempted from the *general rule*, from the *general operation and effect* of a state of war, they must show themselves within some of the stipulated or customary exceptions. I believe it may be laid down as a general rule, that all presumptions must be against them. Sir Wm. Scott says, the *onus probandi* in all prize causes, is on the claimant. 4 Rob. 235.

And in *Sylvester's case*, 7 Mod. 150. it is decided by the court, that whatever the protection or license of an alien enemy may be, it must be set forth in the pleadings. Although these books are not esteemed very high authority, this case receives credit and respect, from a reference in *Bacon*.

But I think it can be shown by precedent, that the allegation is not material. *Alien*, says a learned judge, is a *legal term*, and amounts to many words. In *Sylvester's case* there was a plea, that the plaintiff was "an alien enemy, born under the ligeance of the French king." To this there was a demurrer, and the plea was held good. The allegation, therefore, that he was resident abroad, was not deemed necessary—*Dau. against Davallon and others: Ans. 462.* In another case, the plaintiffs are alleged to be "Frenchmen, aliens, and enemies to the king of Great Britain," and *that* was held enough. The word "*Frenchmen*," said the chief baron, "shows that they are the subjects of a nation at war with us. The averment that they are enemies of the king, is the same thing, as if the plea had said, that they adhere to his enemies."

Here the claimants are alleged to be "subjects of the kingdom of Great Britain and Ireland, and enemies." Subjects of the king of Great Britain, is certainly equivalent to "*Englishmen and aliens*," and they are alleged to be *enemies*—from which it must follow, that they adhere to the enemy, and then whether they are *aliens* is perfectly immaterial. If they adhere to the enemy, they must be treated as such. The terms, "*subjects of the kingdom of Great Britain and Ireland, and enemies*," therefore embrace every allegation, which by these decisions is deemed necessary. In support of these allegations, it is competent, though not necessary, for the captors to prove the residence of the claimants, which has been abundantly shown to be in Saddleworth. In the common law courts, the defendant must set forth, in his plea, every thing requisite to negative the right of the plaintiff to sue. Here, the *onus probandi* is on the claimant. He must show himself entitled to all the privileges he claims.

It being admitted then, and if not admitted, proved, that Messrs. Beswicke and son are *alien enemies*, resident in the enemy's country, the question arises—Whether they can be heard in this court—whether the claim of William Falconer, in their behalf, can be sustained, or must be rejected?

This question abstractly considered is simple enough, and in my judgment, presents but few difficulties. But in consequence of the course which the counsel thought proper to take, and the variety of topics which were introduced and discussed, in the progress of the argument, it has become somewhat involved and complicated.

I had at first intended to take as extensive a view, and give as full a discussion of each distinct point which had been made, as my convenience would allow. But I was embarrassed, and arrested in the execution of this intention, by recollecting the claim interposed on the part of the government; by my ignorance of the precise ground that would be taken on the argument of that claim; and also by the consideration, that some of the questions incidentally discussed here, might be made principal grounds of defence, in the other cases which are to follow this, and be more directly presented for the consideration of the court.

In order therefore to avoid a premature, and anticipated decision of questions, involving the rights of other claimants, and on which other counsel may wish to be heard, I have found it necessary to take a view of this case, somewhat concise and circumscribed.

Beside the authorities which have been cited to show, that an *alien enemy* not here under letters of safe conduct, or under the protection of the government, cannot sue in the common law courts, there are some others to which I shall refer.

The first is the case of *Sylvester*, in 7 Mod. p. 150, already alluded to. It is so early as the 1st of queen Anne, and although it is not full in point, yet it will be perceived, that it bears pretty directly on this question, and in principle is conformable to the later cases which will be examined.

The next case to which I shall refer, is that of *Wells vs. Williams*, reported at length in 1st Lord Raymond, 282, and concisely in 1st Lutwyche, 15, and 1 Salkeld, 46. This case ought to have been stated before the last, as it is anterior in its date, being the 9th William 3d. It was an *action of debt on bond*. The defendant plead, that the plaintiff was an alien enemy, and came into England, "*sine salvo conductu*." The plaintiff replied, that at the time of making the bond, he was, and continued in the country, "*per licentiam, et sub protectione domini regis*." To

this replication the defendant demurred, and contended, that although the plaintiff was in England, by *licence*, and under protection, yet, without a *letter of safe conduct*, he could not maintain a suit. The chief justice, in deciding the case, said "an alien enemy who is here in protection, may sue his bond or contract, but an alien enemy, abiding in his own country, cannot sue here." This case, if it be good authority, seems to be decisive on the question under consideration, and is far from being overruled or questioned, it is manifestly supported by the subsequent decisions, that have been found or cited.

The case of Ricord against Bettenham, in 3d Borough, 1734, was an action on a *ransom bill*. In this the authority of the last case, and the principles on which it rested, were fully recognized, and although the action was allowed, it was admitted to be an exception to the general rule, and sustained exclusively on the ground, that in the single instance of ransom bills, it was the practice of some other European nations.

There are two other cases on ransom bills reported in Douglas, 619, and 625, Cornu against Blackburne, and Anthon against Fisher. These refer to the last case of Ricord against Bettenham, and recognize these suits on ransom bills, as founded on a solitary exception to the general disability of an alien to sue, if resident abroad.

These cases were prior to the statutes of 22 Geo. 3d, which put an end to suits on ransom bills.

The next is that of Daubigny and others against Devallon and others, in the exchequer, Anstruther, 462.

This was a bill for the discovery of goods, received by the defendants, as agents for the plaintiffs, stating the discovery to be necessary for supporting actions at law, intended to be brought by the plaintiffs for the value of the goods. The defendants pleaded in substance, that the plaintiffs were *alien enemies*, resident in France, and relied on the very cases I have cited from Strang, Lord Raymond and Douglas.

It was decided that the plea was sufficient, and Macdonald, chief baron, in delivering the opinion of the court, after stating that *alien friends* may institute suits, and the particular circumstances under which even *alien enemies* may sue, says, "but this claim to the protection of our courts does not apply to those aliens who adhere to the king's enemies. They seem upon every principle to be incapacitated from suing, either at law or in

equity. The disability to sue is personal. It takes away from the king's enemies the benefit of his courts, whether for the purposes of immediate relief, or to give assistance in obtaining that relief elsewhere."

I would ask the attention of the counsel for the claimants to this decision. It is singularly applicable to the peculiar features of their case, and to the nature of the proceeding here: aliens adhering to the king's enemies, shall derive no benefits through his courts.

After such decisive authorities, it must be unnecessary to multiply them. They are too numerous to admit of a minute examination, and I shall only refer to a few others, which prove incontestably that an alien enemy, commorant in his own country, cannot sue in the courts of the other. *Sparenburgh vs. Bannantine*, 1 B. & P. 163 in 1797; *Mc. Connel vs. Hector*, 3 B. & P. 113, 1802; *Le Bret vs. Papillon*, 4 East, 502, 1804; *D'Luneville vs. Philips*, 5 B. & P. 97, in 1806; and this surely is all that is necessary to establish. For if neither of two belligerents can sue the other, how is either to be sued? To prove that neither *can* sue, is all that can be proved.

But *Beswicke & son* proceed by an agent, and I shall cite one other authority to show, that in the common law courts they derive no advantage from that circumstance.

The case to which I allude, is that of *Raphael Brandon against Nesbit*, 6th D. & E. 23. It was an action on a policy of insurance, effected by the plaintiff on account of alien enemies, resident in France, and who were indebted to him the plaintiff, a British subject, in a sum exceeding the amount of the policy, and he intended to reimburse himself in part by a recovery in this suit. Lord Kenyon decided, that an action would not lie, either by or in favour of an alien enemy, under such circumstances. That, what he could not do directly, he should not do indirectly.

This is precisely the case here, and brings the common law authorities directly to the point before the court.

The case of *Bristow against Towers*, in the same book, page 35, is similar in principle.

Having, as I think, sufficiently ascertained that *alien enemies*, commorant in their own country, cannot sue in the *common law courts*, it is proper to examine what are the principles and prac-

tice adopted by courts proceeding according to the *law of nations and of war*.

The first authority to which I shall refer, in pursuing this inquiry, is Bynkershoeck. For of all writers on public and general law, he is the most lucid and satisfactory, on the particular subjects of which he treats.

In the 25th chapter of his treatise on the law of war, at the head of the 8th section, the learned translator lays it down, as the clear and indubitable result of his author's reasoning, "that one who resides in an enemy's country, under a safe conduct from the sovereign, may sue and be sued."

This is the principle adopted by the common law courts.

In the 7th chapter of this treatise will be found what the author considers, in this respect, the disabilities of alien enemies, not thus in the country. In order to meet the remarks which were made upon it, I will state it with some precision. The author says, "that except in the case where there is a mutual commerce permitted by both belligerents, an alien enemy has no *persona standi in judicio*." This phrase is rendered, by the learned translator, "no right to be heard, as plaintiff in courts of justice," and this explanation is relied on to support the right of the claimants to be heard. It is extremely doubtful, I think, whether this be a just exposition of these words; but it is perfectly immaterial whether it be or not. Admit, for a moment, that by these words, the author means to say, that an *alien enemy* "cannot be heard as plaintiff in a court of justice;" and admit also, all that was said by the counsel, that the present claimants must be considered, not as plaintiffs, but defendants; that in common law language, they are not suing, but sued; and how does it aid them? It is very obvious, that this mysterious sentence, is but part of the law which Bynkershoeck means to state. It is but part of what he does state on the subject. He here says, that an alien enemy can have "no *persona standi in judicio*," "cannot be heard as plaintiff in courts of justice." And in the next section he proceeds—"moreover, if you do not permit your enemy to bring actions, neither can you, with justice, suffer them to be brought against your enemy;" and then goes on to reprobate, in very decisive language, a different course which had once been permitted by the Dutch government—so that the explanation of the learned translator may be permitted

to remain as altogether harmless, and not at all at variance with the general law established by the context; which indubitably is, that the subject of one belligerent, cannot have a *legal personal standing in the courts of the other*. He cannot appear or be heard in them, except in the cases which have been mentioned. He is totally *ex lex*. In the language of one of the English authorities, "*he cannot have the benefit of the king's courts.*" Adopting this as the law, it becomes immaterial to inquire, whether the claimants must be viewed as plaintiffs or defendants; whether the proceeding is by, or against them. But surely they are not in the situation of ordinary defendants. In the first place, they are not brought here by any compulsory process. They appear here voluntarily, to assert and prosecute a right, not to defend property, which is demanded of them and in their possession, but to demand and recover property, the possession of which they have lost—not to resist an injury threatened, but to claim a benefit alleged to be withheld. And this is precisely what even the most doubtful authorities say they shall not be permitted to do.

Sir William Scott, who, when his opinions are not influenced by the executive authority, or by the peculiar situation and policy of his nation, is great and high authority, has adopted these principles in their whole extent. "In time of war," he says, "there is a total inability to sustain a contract, by an appeal to the tribunals of the one country, on the part of the subjects of the other. In the laws of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain, in the language of the civilians, a '*persona standi in judicio.*' The peculiar law of our own country, applies this principle with great rigour. The same principle is received in our courts of the law of nations; they are so far British courts, that no man can sue therein, who is a subject of the enemy, unless under particular circumstances, that *pro hoc vice* discharge him from the character of enemy." The same principle then is received in the *Admiralty and Common Law Courts*.—And nothing more is requisite than to conform its application to the nature of the subject in controversy, and to the proceedings of the respective courts. The proceedings in one are *in personam*, in the other *in rem*. If in the one, the benefit of enforcing a personal contract is withheld, so in the other must be withheld the benefit of claim-

ing and demanding the *thing* or *property in dispute*. In the one, he shall not be entitled to a proceeding, *by means* of which he may recover *the value* of the property he pursues, nor in the other the property itself.

Sir William Scott, has not only recognized these principles in theory, but has evidently adopted them in practice. Wherever the character of the claimant, or the property seemed at all tinged with hostility, the claim has either been rejected, or the property condemned. The grounds on which the cases of the *Walsingham* packet, that of the *Juffrowe Louisa Margaretha* and others, referred to in the case of the *Hoop*, were decided, although not precisely to this point, have their origin in the same principle. But I think the case of the *Two Brothers*, 3 Robt 134, is very conclusive. It appears from that case, that even where property is captured within the limits of a neutral country, the *original owners* cannot claim it in the courts of the country, at war with theirs. Their relief must be obtained, through the neutral government of the violated territory. The property being hostile, as between the *captors* and *owners* was liable to capture, unless saved by the *situation* in which it was placed. If so, the government exercising jurisdiction over the place where it was taken, must do justice to the party, whom it has permitted to be injured. That is the only way in which he can obtain it. This principle is certainly incontestable, and will presently receive an application to this case.

Two recent cases have been referred to by the counsel for the claimants, as authorizing the reception of this claim. The *Hope* decided at doctor's commons by Sir William Scott, and the *Zodiack* in the vice admiralty court, at Halifax. But on examining these cases, they will be found to be wholly unconnected in principle with this. The objection to this claim is, that it is offered by, and on behalf of an enemy, who, neither by municipal nor general law, has a right to appear in our courts. But the moment he is divested even temporarily of his hostile character, he is restored to this right. He can be thus exonerated from the character of an enemy, either by an express act of the sovereign power of our own country, or by being placed in a situation, where the law of nations interdicts all acts of hostility from being committed by or against him. This was precisely the situation of the *Hope* and the *Zodiack*. The owners of the first,

were completely exonerated from the character and consequences of hostility, by a license from the British government, which, as to that government, legalized the transaction in which they were concerned, and *quo ad that*, rendered them friends. In every thing that related to it, they were in the situation of neutrals at least. They had an undoubted right therefore, to be heard in the courts of England on every question connected with that voyage. In their character of authorized and permitted traders, they were in a capacity to claim, and therefore to receive restitution. This is a very clear case. Shew a license from this government to Messrs. Beswicke and son to import these goods, and there is an end to the question. They shall not only be permitted to claim, but they shall have restitution.

The case of the *Zodiack* is equally clear. She was captured by a British *Cartel* schooner, which was interdicted expressly by her own government, and by the law of nations, from committing any act of hostility during the voyage in which she was so employed as a *Cartel*. Every hostile act, therefore, on her part was a violation of the faith of her own government, and of universal law. Every capture by her was illegal and void *ab initio*. She was not during *that* voyage, the enemy of the American vessel; *neither* could capture the *other*. If the *Cartel* had been brought in *here* as a prize, she must have been restored *instantly*, on the ground that she was *devested* of her hostile character, by the flag she bore. The American vessel could not be captured by her therefore, as an enemy. The faith of the government was pledged, that her *Cartels* should comply with the usages of war, which require that they shall make no captures, and if they do, that they shall be restored. It is admitted in the case of the *Zodiack*, that the claim is received and restitution awarded, by reason of its own peculiarity. It is an exception to the general laws and rules of war, and cannot be adjudged on general principles.

I shall not quote Chitty's law of nations as an authority. It contains nothing original or new. It is but a hasty and imperfect collection of authorities, as to modern usages and practice, chiefly taken from Sir William Scott's decisions. All he says on the question before us, is a literal extract from the judgment in the case of the "*Hoop*."

The examination I have given this question, leaves no doubt, in my mind, that Beswicke & Son, being alien enemies, comorant in the enemy country, cannot be heard in this court, and that the claim interposed by William Falconer in their behalf, must be rejected.

For the Libellants—D. S. Jones, Griffin, Emmet and Wells.
For the Respondents—Colden, Slosson and Irving.

PENNSYLVANIA SUPREME COURT.

Commonwealth ex rel. Stephenson, a black boy, vs. Samuel Van Lear. Habeas Corpus.

[An assignment of the indenture of an apprentice, is not valid without the assent of his parent, or his guardian, if there be no parent. An indenture of apprenticeship, executed before an alderman of the city of Philadelphia, is valid. Acts of Assembly of Sept. 1790, and April, 1799, expounded.]

TILGHMAN, C. J. Augustine Stephenson, a black boy of the age of about fourteen years, was bound apprentice with the assent of his father, to Francis Duffee of the city of Philadelphia, and his assigns, for seven years. The indenture was executed by both father and son, before George Bartram, esquire, an Alderman of the city. In about twenty-five days after its date, it was assigned by Duffee, without the knowledge of the father, but with the assent of the boy, before the same alderman, to Samuel Van Lear of Chester county. By the act of eleventh April 1799 (sec. 2d.) it is enacted, that "when any master or mistress shall assign over, his or her apprentice, to any person of the same trade or calling mentioned in the indenture, the said assignment shall be legal, provided the terms of the indenture extended to assigns, *and provided the apprentice or his or her parent or parents, guardian or guardians, shall give his, her or their consent to such assignment before some justice of the peace of the county where the master or mistress shall live.*" The question in this case is, whether an assignment without the consent of the father be legal. It is contended on the part of the master, that the law is complied with, if the consent either of the apprentice or his guardian is given.

The words will bear this meaning, but they will also bear another more convenient, and more analogous to the general principles of the law of parent and child, that is to say, with the consent of the apprentice (where he has no parent or guardian) or (where he has a parent or guardian) with the consent of such parent or guardian. This preserves to the infant, the protection

of his parent or guardian, and places the assignment, so far as concerns parents and guardians, on the same footing with the original binding—for there can be no valid indenture without their consent, except in the case of paupers. It is of great importance that the authority of the parent should be preserved as far as is consistent with a reasonable construction of this law—because in direct violation of the intent of an indenture of apprenticeship, it has lately become a lucrative business, to have a boy bound, for the purpose of selling him—and if his consent alone is sufficient, it may be obtained by a trifling bribe, or perhaps, if he be of tender years, by intimidation. When it is said that a thing may be done with the consent of one person, or another, it does not always follow, that the consent of *either* is sufficient—it is sometimes to be understood, according to the subject matter, that in one case the consent of one shall be had, and in another case the consent of another, *reddendo singula singulis*.

We have an instance of this in the act of 29th September, 1790, on the same subject of apprentices; an infant bound apprentice with the assent of his parent, guardian or next friend, *or* with the assent of the overseers of the poor, and approbation of any two justices, &c. shall be as valid as if the infant had been of full age, at the time of making the indenture. Now it cannot be understood, that by virtue of this law, every infant may be bound apprentice by the overseers of the poor, and two justices, although the *words* will bear that meaning—but the true meaning is, that the assent of the parent or guardian must be had, except in cases where the infant becomes a charge on the county. The assent of the one, or the other, is necessary, according to the nature of the case—so with regard to the law in question, where the apprentice has no parent or guardian (a very common case) his own consent shall be sufficient—but where he has a parent or guardian, under whose protection the law has placed him, on account of his own imbecility, the consent of that parent or guardian shall be sufficient. The law would have been better if it had been *and* instead of *or*, and very probably it was so intended—but I dare not take the liberty of altering what is written. The construction which I adopt, comes as near to what I suppose to have been the intent as is consistent with the words.

It was argued that this indenture was void, because not exe-

ented before a justice but an alderman. But considering that in most respects aldermen have the power of justices, and that it has been the uniform practice to bind apprentices in the city before aldermen, I should not think the court justified in taking the boy from his master, if there was no other defect than this in the indenture. I consider the indenture as good, but the assignment bad, for want of the consent of the father. The boy must therefore be discharged from Mr. Van Lear, and delivered to his first master Duffee.

YEATES, J. The traffic in human flesh I abominate from the bottom of my heart. But it certainly is of importance to society that minors should be instructed in some occupation, whereby they may afterwards earn an honest livelihood. It is admitted here, that the original indenture of apprenticeship (for of *servitude* it is not, in which case the boy must immediately have been discharged, because a father cannot consent to sell his child) was legal, the binding having taken place with the assent of his parent, before an alderman of the city, to Francis Duffee and his *Assigns*, who covenanted to learn him the occupation of a waiter. But it has been objected, that the assignment is invalid in this instance, not being made before some *justice of the peace for the county* where the master lived, according to the provisions of the 2d sect. of the act of 11th April, 1799. The answer is, that by the act of incorporation of the city, the aldermen thereof have the same powers and jurisdictions within the city, as justices of the peace have in the proper county.

As well may it be objected, that under the original act of 29th September, 1770, an alderman has no jurisdiction in cases of dispute between the master and servant; for I know no such legal character as a justice of the peace *of the city*—or that an assignment of a servant before him, under the 2d sect. of the old law of 1700, would be subjected to a penalty of 10*l.* because not made before a justice of the peace of the *county*, according to the expression of that act. The uniform practice has certainly been otherwise; and it would be highly inconvenient that persons living within the city, should be obliged to go to a justice of the peace of the county to transact such business before him.

The assignment moreover has been questioned, because the father of the apprentice did not consent thereto. The words of the act of April, 1799, are “the assignment of an apprentice

shall be legal, provided the terms of the indenture extended to *assigns*, and provided the apprentice, *or* his or her parent or parents, or guardian or guardians, shall give his her or their consent to such assignment." It is said here, that *or* must be construed *and*, the consent of the parent being necessary. But this appears to me to be the assumption of an unwarrantable liberty over the expressions of the legislature, by changing its provisions. Such a deviation could only be warranted in a clear case to effectuate the plain meaning of the law. What, if the apprentice consents, and the father refuses his consent, must be done with the former? Must he not be put into a way of learning his *art, mystery, occupation or labour*, whereby he may earn a living? I will not assert, that no inconveniences can arise from a literal, grammatical adherence to the words; but I have nothing to do with the *policy* of the legislature where their expressions are unambiguous. *Ita lex scripta est*. But may there not be assigned a solid ground for discrimination between the original indenture and the assignment of an apprentice? A father or guardian may be the best judges of the fitness of the minor for a particular trade or occupation, consulting his wishes at the same time; but when once bound, it is of great moment that a new master should not be obtruded on him against his own consent. Whatever policy dictated the provision, I feel myself bound by it—and therefore am of opinion, that the boy should be remanded to the custody of Mr. Vanlear, who claims his services, with his full consent, under the assignment.

BRACKENBIDGE, J. The binding an apprentice carries with it the idea of binding to learn some trade or mystery. Household service in a city, town or village, may perhaps be said to be a sort of trade or mystery, which may require an apprenticeship; for it will require time and instruction to make an expert waiter; and one so instructed will receive wages oftentimes above that of an untaught servant. I take it therefore not to be in the idea of the parent in this case that his child should be assigned to one out of the city, with whom he might not have the like instruction of the like advantage; but more especially the parent cannot be supposed to have contemplated the *assigning* to a person out of the city, as he must thereby lose the society and superintendence of his child—which he might still have to *some extent*, while he remained in the city; at least the satisfaction of

having him near him, so that he could always learn the state of his health, and the treatment from his master—in which he must be considered as having an interest, and a right to seek redress if ill treated. I would incline therefore to consider it a fraud upon the parent to assign out of the city or liberties—and to the country, where such a thing as the occupation or profession of a waiter is not so well known—but the child must be employed as a servant generally in all manner of servile labour, the care of cattle, &c. &c. a fraud also, and out of his contemplation, in binding him to an apprenticeship, to carry him to a *distance*.

Whatever, therefore, may be the terms of the act, it would not seem to be within the reason of it, that the apprentice could be assigned even with his own supposed consent without that of the parent.

I say, supposed consent—because he could not in reality have a will, or dare to express it, while under the power of the master. If he had no parents or guardian, having originally bound himself, or his parents dying, and having no guardian, his consent might suffice from the necessity of the case—but having a parent or guardian the intervention of these would seem to be necessary. For the terms of this miserably drawn act would seem to look to the intervention of these, so that in a case where there was a parent, or no parent but a guardian, it would seem that the consent of the apprentice should alone suffice.

It would seem a construction contrary to all reason, that a parent should bind his child an apprentice in a city, which is a little world itself in which he lives, and that he the apprentice should by his consent alone to an assignment, be carried to a *country situation*, and to a distance; and that being bound to learn one mystery, he should by his own consent merely be assigned to learn another; bound to a shoemaker, for instance, and assigned to learn the trade of a taylor. To construe this law liberally, as I am inclined to do in favour of minors and parents, I would hold it that an assignment must be with the consent of both apprentice and parents, and guardian, where there are such. In this case and upon these grounds, I am of opinion that the assignment is void.

Quis haret in litera haret in cortice, the reason of a law must prevail.

OHIO. ST. CLAIRSVILLE, COMMON PLEAS.

United States vs. Alexander Campbell.

[One sovereign state cannot make use of the municipal courts of another government to enforce its penal laws. The United States cannot prosecute in the State courts for offences against their laws.* The constitution of Ohio does not authorise a prosecution by information.]

Information filed by J. C. Wright, collector of the revenue for the 6th collection district of Ohio, against Alexander Campbell, for selling domestic distilled spirits without a license therefor from the collector, contrary to the act of congress in such case made and provided, and praying "that the said Alexander Campbell may forfeit and pay to the said United States the sum of 150 dollars penalty, and also the further sum of 15 dollars duty, by law imposed upon a license to retail," &c. "according to the provisions of the acts of congress in such cases made and provided," &c.

The defendant filed the following exceptions to the jurisdiction of this court.

"And the said Alexander Campbell says, that the information filed against him by John C. Wright, collector, contains no matter or thing to which he the said Alexander Campbell is in this court bound to answer, for that the retailing liquor by the quart is not an offence against any of the laws of the state of Ohio, of offences against which laws only, this court can take jurisdiction—and for that also by the constitution of the state of Ohio, no man can be held to answer any offence in the courts of the said state except upon indictment or presentment of a grand jury; wherefore the said Alexander Campbell prays that he may be discharged from answering said information, and that the same may be quashed.—*C. Hammond, attorney for defendant.*"

* A similar decision is said to have taken place in the Superior Court of Virginia.

TAPPAN, J.—This is a very important question of jurisdiction, upon which, if I had doubts, I would take further time to deliberate before giving an opinion; as I have none, I will not delay the cause by a continuance, but proceed to give my opinion notwithstanding the pressure of business may prevent my adverting to many of the reasons and grounds whereon that opinion is founded.

There can be no hesitation in asserting that a proceeding by information is a criminal prosecution, and that it hath always been used as such—4th Bl. Com. chap. 23d. the king v. Berchet and others, 1st Shower, 106—I refer to these authorities as fully supporting both propositions.

The first question will then be, can the United States prosecute for offences against their laws in the state courts?

This will depend upon the constitution of the United States, and the constitution of this state.

The state of Ohio is a sovereign and independent state, not controllable by any earthly power in the making or administration of its laws, except only in such particulars as it hath delegated a portion of that sovereignty to the United States by the federal constitution, and as it hath limited itself in the exercise of power by the same constitution.

The constitution of the United States creates a distinct and separate government from the several state governments, and delegates specific and limited powers to the government so created. By the 3d article, section 1st and 2d: The judicial power of the United States shall be vested in one supreme court and in such inferior courts as the congress may from time to time ordain and establish—and “The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty, and maritime jurisdiction; to controversies to which the United States shall be a party,” &c. The judicial power of the United States extends to the case now before this court, and that power is wholly vested in the United States’ courts; the supreme court of the United States hath an appellate jurisdiction in all controversies to which the United States shall be a party; there is no clause in the constitution of the United States which authorises

congress to give jurisdiction to the state courts, or to require the performance of any judicial duties of them; it cannot be said that congress by their laws ordained and established us a court of the United States, for by the operation of the 8th sect. of the 3d article of the constitution of this state, if such were the fact we should cease to be a state court; and will it be imagined that an appeal can be taken from this court to the supreme court of the United States? The powers not delegated to the United States by the constitution are expressly reserved to the states or to the people; it follows necessarily and clearly to my mind, that congress have no power to vest any jurisdiction whatever in the state courts.

This is a criminal prosecution; it may well be doubted whether one sovereign state can sue in the municipal courts of another state; but waving this point as not necessary to be here decided, I assume it to be a settled principle in jurisprudence, that one sovereign state cannot make use of the municipal courts of another government to enforce its penal laws. No one would doubt for an instant, if the government of Great Britain or France, or even one of the other states of the union, were to attempt to maintain a criminal prosecution in our courts, that it would not be permitted; and yet as to its judicial power, and its penal laws, the government of the United States is as much an independent state and separate government as Great Britain, France, or either of the United States.

It hath been urged, that the constitution gives to congress the power to lay and collect taxes, duties, imposts, excises, &c. and to make all laws which shall be necessary and proper for carrying that power into execution: that to collect the excise they have judged it necessary to vest a jurisdiction in certain cases in the state courts. If they have judged it to be necessary, they have been mistaken—convenience is not necessity—their own tribunals are sufficient to enforce their laws. If it be true, that congress, under this provision of the constitution, may pass any laws they deem necessary to carry their specific powers into execution, and are themselves the sole judges of such necessity, where are they to stop? Possessing the sword and the purse of the whole confederacy, nothing more than the establishment of such a principle is wanting to vest congress with absolute power, and to effect a complete consolidation of the states. We have

seen that the constitution of the United States doth not give congress the power of vesting jurisdiction in the state courts—the constitution and laws of Ohio do not give us jurisdiction, nor can we sustain it on general principles of law.

An opinion has been read in which it is stated that the 3d article of the constitution of the United States vests in the government of the United States a *privilege* of having their causes determined in their own courts, and that this *privilege* may be *waived* by them—by the 1st art. of the constitution, the legislative powers of the United States are vested in congress—by the 2d art. the executive power of the United States is vested in a president. I do not see why this doctrine of *privilege* and *waiver*, may not with as much reason be applied to the legislative and executive as to the judicial power, and so the whole government of the United States *waived*. This theory is new, it is beyond my comprehension.

The second question raised in this case is, whether this court can sustain a criminal prosecution by information under the constitution of this state.

By the 10th section of the 8th article of the constitution of Ohio, it is declared, “That no person arrested or confined in jail shall be put to answer any criminal charge but by presentment, indictment, or impeachment.”

An information is as much a criminal prosecution as an indictment; the same process issues on the one as on the other, to bring the person charged or informed against before the court, and that process with us is a *capias*—the defendant hath been taken by a *capias*, and is now holden to answer this information.

I think that a fair construction of our constitution requires us to say, that the proceeding by information is prohibited by it. If we examine the history of informations we shall find that they have crept into use against the plain meaning of Magna Charta; that although in England a series of precedents support them, yet they are neither suited to our principles of government, nor countenanced or permitted by the state constitution. Such is the unanimous opinion of the court.

SOUTH CAROLINA. CIRCUIT COURT.

Gill, Canonge & Co. vs. Levi Jacobs. Habeas Corpus. May, 1816.

[A discharge under the insolvent law of South Carolina, cannot suspend or weaken process in the circuit court of the United States, for the same district, so as to entitle a defendant in the marshal's custody on *mesne* process, to be released on common bail.]

DRAYTON, *District Judge*. This was a case of *habeas corpus*, in which a motion was made to discharge defendant on common bail; he being in the marshal's custody on *mesne* process, issuing from this court, with an order for bail. The plaintiffs are citizens of Philadelphia; and the debt to a considerable amount, (upwards of \$6,000)—was contracted with them there. The defendant having been arrested by process, issuing from the state court of common pleas, has been discharged by the same authority, under the insolvent debtor's act of this state, passed in the year 1759. He therefore contends, he should be enlarged on giving *common bail*; as he has been arrested since he was so discharged.

On the part of the plaintiffs, it is urged, they were not parties to this discharge—not having due notice; nor were they parties to the record. That they have not agreed to receive any portion of the dividend; and, therefore, they ought not to be delayed, or prevented having due relief, under the laws of the United States, and the practice of this court.

The case before me being strictly a mercantile contract, will be considered as referring to those laws which relate to commerce and merchandise. As respects their principles, it is contended there is a difference between a bankrupt and an insolvent debtor; as the first becomes so by omissions and commissions, as well as by compulsory process; whereas, the latter is so situated, by the effects of a suit at law, and by taking the benefit of an insolvent debtor's act thereupon, for regaining his liberty.

This distinction, and the discharge obtained in the state court, appears to be the general grounds on which the argument seems to rest. For bankrupts being exclusively concerned in trade and merchandise, in buying and selling in gross, or by retail; dealing in exchange, and in other acts of necessary commercial intercourse; it seems but reasonable they should be protected and controlled by laws, more especially for themselves; and which the practice of civilized nations is in the habit of ordaining. Hence a bankrupt law, may be very different from an insolvent debtor's act—as a bankrupt law relates to the interests of merchants and traders; whereas, an insolvent act relates to the general interest of society. If then, this distinction of interest prevail; can it be said, the distinction of rights does not also prevail?

By the 8th sec. 1st art. of the United States' constitution, congress have a right "to regulate commerce with foreign nations, and among the several states," also to establish "uniform laws on the subject of bankruptcies throughout the United States." The power, then, of making bankrupt laws, no longer remains with the several states; it is vested in the United States government. And, how far a transient merchant, indebted in *Philadelphia*, can plead in this circuit court for the district of *South Carolina*, a discharge under the insolvent debtor's act of *South Carolina*, obtained in the state court, against a suit instituted in this court—is the question which is now before me.

On this point, involving the rights of the United States, and individual states, I feel myself delicately situated in deciding the contending claims. More especially, as one of the particular reasons for calling into existence the present constitution of the United States, was to equalize the commerce and trade, and the rights and privileges of the American, and other merchants and traders, throughout the union, and with foreign nations. Unless then, the question be considered, as having this grand object in view; the merits of this case will be carried back, to where they would have been, before the passing of the constitution: The *lex loci*, and *lex fori*, of the several states, would be brought under special consideration, as having more controlling powers, than I think ought to be admitted at this day. Each state would then by such reasoning, be deemed to authorise discharges of insolvency according to its own laws, and in mercantile concerns; not

by uniform laws resting on the same principles, and promoting the same ends, but sometimes conflicting in points of justice and expediency, not only with themselves, but with the United States, and the principles of their superintending government.

On the 4th of April 1800, a bankrupt law was passed. It was limited to the term of *five years*; and from thence, to the end of the next session of congress thereafter, and no longer. It then expired—and there has never been since, any bankrupt law in the United States. What were the reasons which influenced congress, not to revive that act, or not to pass a new one, is not for me to say. Although it would appear, that the different decisions which take place in the courts of the United States, and in those of the individual states, afford some grounds for the reconsideration of a bankrupt law; as well as the great inconvenience resulting from the want of one, to which parties are occasionally subjected, by vexatious suits in different states of the union against insolvent debtors, after they have obtained insolvent discharges in one of the states. In passing the bankrupt law, it is evident congress looked towards bankrupt merchants and traders *especially*; as respecting the *insolvent act* of state authorities. For in the 61st sec. of the bankrupt law—*Laws United States, vol. 5, page 81.* it was expressly enacted, that this act shall not “repeal or annul, or be construed to repeal or annul, the laws of any state now in force, or which may be hereafter enacted, for the relief of insolvent debtors, *except so far*, as the same may respect persons, who are or may be clearly, within the purview of this act.” It is said however, this act has expired, it does not thence follow, that the reasons which gave rise to the exception, do not still exist. And so far it does not come within the rule, of *cessante ratione, cessat et ipsa lex*.—If then they do exist, I see not why for national and commercial purposes, this court should not give them a consideration, although they be not engrafted into a bankrupt law. Under this impression, it would seem the distinction taken by the defendant’s counsel, between a bankrupt law, and an insolvent debtor’s act, has not been improperly introduced.

Among the great features of government, population and credit are to be ranked. As to the population, congress has equalized that, by acts of naturalization throughout the United States; but having no bankrupt law, the credit as to provisions for bank-

rupts, and for securing the rights of their creditors, has not been so equalized, resting, at present, upon the insolvent acts of individual states, and the discretion and decisions of courts, having cognizance. It hence results, that foreigners and citizens of different states, will look to the government of the United States for some general system, as either emanating from their laws, or from their courts; and more particularly when they commence suits in the courts of the United States. The obligation is, therefore, the more imposing upon these courts, having this high responsibility, to carry all such suits into effect, in as uniform a manner as possible; so far as their authorities will permit, agreeably to the rights and just expectations of individuals, and the confidence so reposed in the United States' government.

It is urged, this court is bound, in this case, by the 34th sec. of the judiciary act, *Laws of the U. S. vol. 1st. page 74*; but I do not see for what reason: as I think it can be made to appear, the meaning of that section, as contended for, does not at present apply. By that instrument it is enacted "That the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decisions in trials at common law, in the courts of the United States, where they apply." As it is not necessary on the present occasion, to give an opinion respecting the discharge of an insolvent debtor against the debt itself, I shall not do so; but will confine myself to that part of the state act which enacts that the discharged debtor *shall not be liable to be sued, impleaded or arrested for a twelve month after his discharge.*—*Grimke's Laws of South Carolina, 249. sec. 2.*

Can it be said, this part of that act applies? Does it not impair the security of the contract, between Jacobs the defendant, and Gill, Canonge & Co. the plaintiffs? and if it do, is it not in direct opposition to the constitution of the U. States?—These are important questions, which should be well considered before a decision take place.—As to any inconvenience which may arise to the defendant under arrest, it remains with himself to give bail and be liberated from his confinement: if he cannot or will not, this court is obliged to perform its duties in the premises, however desirous it may be to relieve his personal necessities.—And in doing so, I cannot but say, that were the present motion to be

sustained, and the defendant admitted to common bail; the security of the plaintiffs would be much weakened and perhaps might be for ever lost. For the state court is in possession of his schedule and property, given up upon his discharge; said by no means to be equal to the payment of his debts allowed in that court. Of course the defendant has nothing to rest his suit upon in this court, but the defendant's person or security for the same; without which the defendant might abscond to whatever quarter of the world he pleased; thereby weakening, if not forever nullifying his creditors' just demands. The reasoning of Judge Washington, in the case of *Golden vs. Prince*, *Hall's Law Journal*, 502, and of Judge Story in *Gallison's Reports*, 374. *et seq.*; strengthen my opinion on this head.

As to the cases, cited from the 1st and 2d *Dallas*, 100, 231, they are between state authorities; and in my opinion, do not apply any more, than the insolvent act of this state may be said to apply to the present case. Whenever the final discharge is brought before this court, in bar of this suit, and at a proper stage of the pleadings, it will be time enough to consider its bearing character, as to discharging the debt.

By the 11th section of the judiciary act, *Laws of the U. S.* vol. 1st, 55, the circuit court has cognizance where an alien is a party; or, a suit is between a citizen of the state where the action is commenced, and a citizen of another. This gives authority to the circuit court, to maintain the action: and is an implied contract, between the United States and the parties concerned, that it shall be so maintained. But, if a state law be allowed to come in with a sweeping effect, as a bar to the action, confidence is at an end; and the court is at the mercy of a state authority—1 *Gal. Rep.* 382. Upon this principle, the impropriety of the motion in this incipient stage of the suit, and before the return of the writ, is, in my opinion, apparent; insomuch, as to induce a court to be on its guard how it allows the claims of an individual under an arrest, when a little time and a regular practice would better conduce to justice and the end proposed. Besides, by the laws and practice of this court, a defendant cannot take the benefit of the insolvent acts, until after judgment obtained: 4th vol. *Laws of U. S.* 123—5th vol. *Laws of U. S.* 6: whereas in the state court, he has the benefit of them on *mesne process*, before judgment obtained—This marks a difference between the practice of

the United States courts and the state courts; as to cases of insolvency, which is of importance in this enquiry—It consequently results, that the security of the creditor in the court of the United States, is greater than in the courts of this state; as he has a longer time to search out cases of fraud against his debtor; and is thereby the better enabled to provide for his own security, before the debtor can be liberated or discharged under insolvent debtor acts.

Upon the whole, without touching any other contested points of the argument, (deeming it unnecessary in the opinion I am about to give) the case appears to me, to resolve itself into this:—that, by the constitution of the United States, the individual states have given up their rights of legislating, as to commerce and bankruptcy: that this right is now solely in possession of the United States government, which through its laws and judiciary, is bound to watch over and superintend the same: that no bankrupt law existing at this time, does not affect the main question—because the right in government still remains to enact one; or to repose its confidence in the judiciary, as to their decision respecting the same, in relation to the state laws: that the courts of the United States by admitting defendants to the benefit of the state insolvent acts, under the superintending and contracting power of the laws of the United States, now existing, can and do promote the due ends of justice, as relating to bankrupts. But, it must be remembered, all this is done under the authority of the United States, and not under that of state authorities; although in doing so, the insolvent acts of the states are referred to, as *rules of decision in cases when they apply*; as declared by the 34th section of the judiciary act. Under these impressions I do not think, that by insolvent discharges from the courts of this state, the insolvent debtor's acts of this state, should be allowed to suspend or weaken the lien of process in this court, in the manner contended for in this case. It would be an interference between creditors and debtors; *and certainly would tend to impair the obligation of contracts.*

June 27.

PHILADELPHIA NISI PRIUS, OCT. 1816.

Commonwealth ex rel. Frantz Anthon Van Ritter, vs. Captain John Schultz. Habeas Corpus.

[An agreement between the master of a vessel and a passenger, that the latter shall remain on board until he has paid his freight, is lawful. He cannot plead as a set off, that the master did not furnish the provisions which he stipulated. These are mutual covenants, on which each party may have an action.]

TILGHMAN, Ch. J. It appears by the return to the habeas corpus and the evidence which has been given, that the relator Frantz Anthon Van Ritter, was a passenger together with many others, Germans and Swiss, in the brig Ceres, from Amsterdam to Philadelphia, and the defendant captain Schultz, detains him on board the said brig, now lying in the Delaware, off Philadelphia, by virtue of a contract made between the captain and passengers at Amsterdam, by which the passengers agreed not to leave the brig without permission of the captain, until payment of their passage money. It is contended by Van Ritter in the first place, that this contract so far as concerns the engagement not to leave the brig is illegal and void—but that even if it were valid, the captain having not performed his part of the agreement has no right to detain him.

The contract is said to be illegal, because it is oppressive and unconscionable, and because it is against the public interest and general policy of the country.

It is not pretended that the passengers in this vessel, are to pay more than the usual freight; or that any deception was put upon them, at the time of entering into the contract. They came on board in the usual way and made such an agreement for their passage as is commonly made. Having no money, nor being able to find security at Amsterdam, they stipulated not to leave the brig till they had paid for their passage. They knew very well that they could make no money during the passage, nor could they expect to borrow it on their arrival in a strange

country. But it was also known that by indenting themselves to serve for a term of years, the money might be raised; and in order to secure the captain who carried them over the sea and supplied them with provisions, they promised not to leave the brig until they had paid for their passage, which in substance amounted to an engagement, to raise the money by indenting themselves before they left the brig. Their object was to advance their fortunes in a new country, an object which had been frequently attained by their countrymen, who had gone to America before them—and it is not easy to conceive any better means of accomplishing their object than those which were taken. Supposing then the contract to have been fairly complied with on the part of the captain, I can perceive nothing in it unreasonable and unconscientious; on the contrary it was advantageous to the emigrants. Having no money, they obtained credit by giving the only security in their power, a security which if not abused on the part of the captain could be productive of no hardship whatever.

But it is said to be against the general policy of our laws and government. If it be so, it must be either because of the indenture of servitude, or because of the right of the captain to detain the passengers until they enter into such indenture. Upon consideration of our laws and customs, it is extremely clear, that an indenture of this kind is not only not against our policy, but that it is conformable to the policy and custom which has prevailed from the earliest times. In the case of the *Com. v. Kepsale*, 2 Dall. Rep. 197. this subject was materially considered, as appears from the opinion of Judge Bradford, who as is well known, was remarkable for deep and accurate research. He states this custom of persons coming from Europe, binding themselves and their children as servants in America to pay for their passage, as having originated with the first adventurers to Virginia. It arose from the circumstances of the country, and being found eventually beneficial to the merchant and the adventurer, it has never ceased, but was introduced into Maryland and Pennsylvania, which were colonized after Virginia. We find it referred to in our statute book so early as the year 1700, in fact there was a convenience in it so obvious that it could not be relinquished. It has been the favourite policy of Pennsylvania to encourage particularly the importation of Germans. The

name of *German Redemptioner*, which implies servitude, is familiar to her laws. Servitude of this kind is no disgrace; and the soundness of the policy, which encouraged it, is proved by this notorious fact—that many of the Redemptioners having honestly served out their time, have arisen to eminence both of *character* and *fortune*, and the same remark is applicable to many who have been imported from Great Britain and Ireland. Our laws have paid particular attention to Germans, because we seem to have expected a greater emigration from Germany, than from any other country—because we considered them as a steady, sober, industrious people, remarkably fitted for agriculture—and because, being ignorant of our language, they stand more in need of legislative protection, than the emigrants from our mother country. Accordingly we find that on the 8th April 1785, an act was passed “for establishing the office of a register of all German passengers who shall arrive at the port of Philadelphia, and of all indentures by which any of them *shall be bound servants for their freight*, and of the assignment of such *servants* in the city of Philadelphia.” This act contained many provisions beneficial to the Germans, and by another act passed 12th March, 1810, “all masters or mistresses of German Redemptioners who are minors, and who shall arrive at the port of Philadelphia after the passing of said act, shall give to the said Redemptioners 6 weeks schooling for every year of his or her *time of servitude*, and it shall be the duty of the register of German passengers, to insert the same fully in their indentures.” It cannot be denied therefore, that this kind of servitude has been recognized and provided for by our laws, so that it only remains to consider, whether the right to *detain the passenger on board*, till he pays the money, or in other words till he indents himself, is contrary to the genius of our laws or constitution.

If we wish for the importation of Germans, who have not money to pay their passage, we must permit the merchant who imports them to have security for his freight. Now in what other way can these people give security, than agreeing to remain on ship-board till they indent themselves as servants? I confess that none has occurred to me, nor has any been suggested by the learned counsel who have argued for the relator. They have said, indeed, that the passenger may agree in Eu-

rope to indent himself on his arrival in America, and the ship owner may sue him if he does not comply with his contract. But what security is there in that? The owner might as well have rested on a simple promise to pay the freight—And what advantage would the *honest* passenger derive from being sued on his contract? A fraudulent man indeed might think it for his interest to go to gaol, and come out by the insolvent act; but one who meant to act fairly, would rather remain on board, till he had raised the money, than to subject himself to an action for the freight merely for the sake of setting his feet on shore a few days sooner. But it is objected that *private imprisonment* is odious and intolerable. I grant it, and should not be for ordering it—but how can this be called *private imprisonment*? Have not our laws provided that public officers shall visit the ship, and examine the condition of the passengers? Is there not free access for the friends of the passengers, for strangers who wish to contract for their service, and for the members of that respectable society whose object and duty it is to afford relief to their countrymen in distress—If this access were denied, it might then indeed be called a *private imprisonment*, for which this court would give immediate redress. Supposing then this right of detention to be exercised with mildness and humanity, according to the true meaning of the contract, I perceive nothing in it either inconsistent, oppressive, or impolitic; and in this sentiment I am supported by an authority no less than the legislature of the commonwealth—For by an act passed 22d April, 1794, (sect. 13) “it shall be lawful for the master, captain or owner, or consignee of any ship, or vessel, importing passengers into this commonwealth as aforesaid, to keep and detain any such passengers, who are unable to pay their freight, on board the same ship or vessel wherein they were imported respectively, for the space of thirty days after their arrival opposite the city of Philadelphia, in order that they may have time to find out relations or friends, who may discharge their freight, or to agree with some person, or persons, who shall be willing to pay the same in consideration of their servitude for a term of years, agreeably to custom.”

The above is part of a law for establishing a health office, &c. The laws concerning the health office are various and complicated—several have been made and several repealed, in whole

er in part. As the passage I have cited was not mentioned in the agreement, I presume it was supposed to be repealed. I will not take upon me to assert positively, that it is not repealed, but after a pretty diligent search, I have not been able to find the repeal. If it be still in force, the right of detention is clear, because the thirty days given by the law have not expired. But even supposing it to be repealed, I am of opinion for the reasons I have given, that the right still remains, in cases where the contract expressly stipulates for it.

But it is contended that the defendant by violating his part of the contract, has perfected his right of detention, because the stipulations on his part are in nature of a *condition precedent*, which must be strictly performed before he can have any remedy on the contract. This however, is not the construction of the agreement. The word *condition* is indeed to be found in it, but on the whole it appears to be an agreement in which there are mutual covenants, on which each party may have an action although he may not have strictly complied with every thing to be done by him. The captain agrees to bring the passengers to America, and furnish them on each day of the passage with certain articles of provision—on the other hand the passengers promise to conduct themselves in an orderly and peaceable manner, and pay their freight at the end of the voyage—But it never could have been intended that if the captain failed in *some small article* on *one day*, he should therefore have *nothing*, for bringing the passengers across the Atlantic; or that a passenger by one trifling act of rudeness or misbehaviour should forfeit all right to the benefit of the agreement. Van Ritter has been safely brought to America, which is the main point. For this he certainly must pay something, although he may have claims against the captain for breaches of the contract. Some breaches there certainly have been. I allude not to those acts of violence, rudeness and indecency done by the officers of the brig (though not by the captain personally) to many of the passengers, and particularly females.—Although I highly disapprove of these things, yet they cannot properly be taken into consideration in the present enquiry. Personal injuries to others are not the concern of Van Ritter. For the beating of his wife indeed he has an intimate concern, but it is not a wrong of a nature that can be set off against the captain's claim to freight.

But when I say that the contract has been broken, I mean in the article of provisions. Potatoes and vinegar were not furnished at all, and as to the rest the passengers were put upon short allowance during great part of the voyage. It is insisted indeed by the captain that this short allowance arose from necessity. It is a point on which I am not fully satisfied, but a jury will decide it, if it should ever be brought before them. But granting that there have been breaches of this contract, how can I measure the damages? It is a thing which without the assistance of a jury, I could not pretend to. The question then is whether, supposing for argument's sake, the claim of freight to be liable to some deduction, the captain therefore forfeits all right to detention. It appears to me that he does not; and that the right of detention remains until the whole balance of freight is paid. The agreement is that the freight shall be paid and the passengers shall stay on board until it is paid, that is until the whole is paid. If upon mature reflection it shall be thought by the German society, that this is a case which requires further investigation, they will no doubt support the passengers in the prosecution of their rights. I see some of the members of that society attending here and am glad to see them, they may render essential service by making a strict but *dispassionate* enquiry, into the conduct of all captains who arrive at this port with passengers; by discouraging all litigations about trifles, but firmly supporting their countrymen against every species of oppression and every substantial breach of contract; on their conduct much depends.—Their duty is important, and in the discharge of it they may do much good, or much ill.—That they will choose the good I hope, and I have no reason to doubt it. Upon the whole, it is my opinion that Van Ritter should return to the brig, and remain there according to his agreement.

MARINE COURT, NEW YORK.

SHAVING—ASSAULT AND BATTERY.

Peter Duffie, vs. George Mathewson and others.

[The captain and crew of a vessel on the high seas, have no right to permit or excite old Neptune to shave a passenger and immerse him in a tub of water, contrary to his will.]

This was an action of assault and battery, alleged to have been committed on board the British ship *Thomas*, of Lancaster, while on the high seas, of which ship Mathewson was the captain, the other defendants seamen, and the plaintiff one of the passengers.

It appeared that the ship came from the chalky cliffs of Albion, with a number of passengers, and arrived on the banks of Newfoundland. The sons of the deity who rules the wide domain, through which they had passed in safety, with joy beaming in every eye, met and conferred. By a recurrence to ancient legends, coeval with the common law, and among them, of greater validity, it was found that as often as a landsman came in view of the Banks, before them, he must produce a bottle of Cognac or rum, as an acceptable sacrifice to Neptune.

The nature of the sacrifice was explained to the landsmen, and the greater part complied with a requisition, sanctioned by immemorial usage; the defendant, with others, refused.

Whereupon the seamen invoked the god, with sad complaints: "Oh! Omnipotent Father, king of the ocean, behold the rebellious sons of Terra, who have dared to intrude into thy dominions, refusing to bend before thy divine altar, and to render to thee an accustomed libation. Their beards, Oh! father, are long, uncouth and indecent; retained by them in defiance of thy laws, and in derision of thy divinity."

No. XXI.

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The father of ocean heard, and lifted his awful head sublime above the waves, attended by the Tritons, the Nereides, and all the daughters of the azure main.

He saw his children, and thus responded to their complaints, through a brazen trumpet, whose reverberations shook the distant promontory of Chapeau Rouge, and re-echoed through the spacious bay of Placentia: "Carry these impious mortals from my presence—behold their beards, which they dare to retain in despite of my authority. They shall be shaved."

"Sic fata sinant."

He said, and taking his razor and shaving box from his car, while Amphitrite held his horses, he seized the prow and ascended by the head rails into the lofty ship. His presence inspired his children with joy. But while imparting his commands, through his brazen trumpet, to the crew, the landmen below trembled.—"Bring hither that tub, and fill it with sea water." 'Twas done. "Bring forth the long bearded tribe, one by one." The command was obeyed—but Duffie, when it came to his turn, was inclined to be refractory, and resisted—But who can resist, when gods command?

The razor used by his godship, was manufactured in the caverns of *Ætna*, by one of the Cyclops, from an iron hoop; and, though somewhat *rough on the edge*, did good business.

Held above the tub, Duffie underwent the operation with streaming eye, while the most unsavoury smell from the lather entered his nostrils. As soon as the office of the razor was accomplished and the awful oath, which binds even gods below, was administered, the tub below received him; the ceremony was done, and the god descended into the bosom of the "vasty deep."

It appeared that a lady passenger, named Ann Jones, was subjected to the same ceremony, the humour of which was enjoyed by Duffie, in common with the others. Markwell personated Neptune, and the captain acted in the capacity of assistant to the deity, and was aiding, abetting and assisting in the ceremony.*

* Whenever a vessel arrives on the equator or any remarkable head land,

MR. JUSTICE SWANSON charged the jury, that it was the duty of the master of a ship to treat his passengers with attention and politeness. The captain stood in the same relation to the passengers, as a master of a hotel or an inn did to his guests. Having the superintendence of his vessel, the law had invested the captain with the authority necessary for preserving peace and good order.

On this occasion, the captain not only failed in treating the plaintiff with a becoming decorum, but countenanced and actually had some agency in the injury charged in the declaration. The conduct of the defendants towards the plaintiff, was highly reprehensible. After taking into consideration the wounded feelings of the plaintiff on the one hand, and the circumstances of the defendants on the other, it would be the duty of the jury to render such a verdict as they considered just and equitable.

The jury rendered a verdict in favour of the plaintiff, for forty-six dollars.

Caines, counsel for plaintiff.

Fay, counsel for defendants.

where the raw hands or passengers have not been before, the seamen, according to an old usage, frequently proceed to the ceremony of shaving, which is thus performed: one of the crew, who is best calculated for drollery, is habited in a fantastic, ridiculous manner, and, with a speaking trumpet in his hand, personates old Neptune. He goes forward to the bow of the vessel, where those who are to be shaved, are kept below, and descends until, perhaps, he reaches the water, and from thence ascends on deck, pretending to have emerged from the ocean. He hails the crew with his trumpet; answers are made, and mutual congratulations pass between his godship and the old seamen. He proceeds to order the requisite apparatus for shaving, which generally consists of a piece of iron hoop, a composition for lather made of slush and other offensive matters, and a tub of water. The persons who are to be shaved, are then brought on deck, one by one, blindfolded. Those who have treated well, are shaved light, while those who are refractory are shaved hard. After shaving, his godship proceeds to swear the novice to divers singular observances, one of which is, that he "will never eat brown bread when he can get white."

The one shaved, is then either immersed in a tub of water, or has a bucket from above, poured on his head, and the frolic ends.

REVIEW.

1. *Debate in the House of Representatives of the Territory of Orleans, on a memorial to Congress, respecting the conduct of General Wilkinson. New Orleans, 1807.*
2. *The trials of Judge Workman and Colonel Kerr, before the U. States Court for the Orleans district, on a charge of high misdemeanour, in planning and setting on foot a military expedition against Florida and Mexico. New Orleans, 1807.*
3. *A faithful picture of the political situation of New Orleans, at the close of the last and the beginning of the present year, 1807.*

We have already devoted a considerable portion of our journal to the proceedings in the action commonly called the *Batture* or *Alluvion* cause of New Orleans; a law-suit the most important and interesting to be found in the juridical history of our country, whether we regard the singular circumstances of the property in dispute, the variety and intricacy of the laws respecting it, or the ingenuity, learning and eloquence of the eminent persons by whom the affair was so ably investigated before the tribunal of public opinion. Our readers, we are happy to say, were well pleased with our selection of the publications on this subject; and the transactions we are now about to lay before them, arising in the same very interesting territory, are perhaps not less momentous to the public than the particulars of that celebrated cause. Belonging to the judicial as well as the political history of the union, they come fairly within the scope of our miscellany.

Of the memorial which gave occasion to the debate, mentioned in the first publication under review, the following passages seem the most worthy of being recorded:—

“Extraordinary and alarming events, oblige the legislative council and house of representatives of the territory of Orleans, to appear in the character of complainants, at the bar of your honourable body.

"The annexed documents support the following statement of facts, to which we entreat the immediate and efficient attention of the proper branches of government.

"The return of the regular forces to this city in ——— last, announced to us the settlement of our differences with Spain upon our frontiers, and we felt grateful to those who had been instrumental in tranquillizing the country. But our tranquillity was of short duration. Measures were soon put into operation which filled the city with alarm, and every thinking mind with the apprehension of the most sinister events. Very active preparations were made for defence, but the utmost mystery observed as to the cause; rumours were put into circulation of an intent to proclaim martial law; and the old forts which command the city were repaired. At length, when a sufficient degree of alarm had been created, the merchants of the city were invited to convene at the government house on the ——— day of December last, and many of them attended. They were met by the governor of this territory, and brigadier general Wilkinson. The latter communicated to them that the preparations then making were to oppose col. Burr, who had formed a plan to sever the western from the Atlantic states, and to invade the province of Mexico. That in the prosecution of these objects, he would himself be at Natchez, with two thousand men, by the 20th of December, and would soon after be joined by a body of six thousand men. That with this force he would march down to this city, take possession of it, plunder the banks, and seize the shipping to transport his army, under convoy of a British fleet, to La Vera Cruz.

"This information, he said, he had received, partly by a letter from Mr. Burr addressed to him (the general) written in cypher, and dated the ——— last, and received by him, at Natchitoches, on the 16th of October last; which letter, or a decyphered copy, he produced; and which, among other things, acknowledged the receipt of one from the general of the 6th of the preceding month, and asked his advice as to the propriety of taking Baton Rouge on his way down. Other parts of the plan, not contained in the letter, he stated had been communicated by a messenger from Mr. Burr, who had been sent to him at Natchitoches.

“ The governor supported the general in a speech, in which he stated his belief in the existence of the danger, and read a letter, which he said was anonymous, but the hand writing of which he knew to be that of a respectable gentleman in Tennessee. The parts of this letter which were read, advised him to beware of traitors—to beware of the month of December—to beware of the Ides of March—to *beware of the general*; and gave hints of some design against the city; it has since been discovered that this letter was actually signed *A. Jackson*, and advised the governor to beware of Wilkinson. Both the general and the governor united in recommending an embargo on the shipping, as a measure essential to the general safety; the merchants who were present acquiesced in the necessity, and the embargo was laid. A ship of war was immediately stationed below the city to prevent the departure of any vessel without the general’s passport, and some which had sailed without this document, were brought back and detained until it was procured, although the necessary clearances from the custom-house had been given; and we believe that although the collector has not since the ————— refused the papers required by law, no vessel is suffered to pass the fort at Plaquemine, without the general’s permission.

“ Upon the illegality of this embargo, we need not offer a single argument. The legislative power of congress alone could legally enforce a measure of this nature. Upon its expediency, many considerations occur. Gen. Wilkinson was the only witness of Mr. Burr’s treasonable designs; he stated his plan to embrace the attack of this place, the plunder of its wealth and seizure of its shipping; and in order to counteract these projects, it was determined to keep all the shipping in the harbour, to deprive them, by enlisting their seamen, of all hopes of escape, to detain the treasures of the banks, and by withdrawing all the outposts, and collecting the military force at New Orleans, to leave all the territory open to the invasion of the enemy.

“ We do not pretend to be judges of military operations, but on a point so essential to our safety as the defence of our territory, and so important to the union as the maintenance of its tranquillity, we can but advert to the impropriety of keeping

the regular forces insulated in this city, and withdrawing the garrisons from fort Adams and Natchitoches, when the obvious policy, if invasion were apprehended, would have been to have met it in the defiles of the upper country, aided by a numerous militia, instead of waiting an attack in a town incapable of defence; or if the attack of the Spanish dominions were meditated, to have occupied the garrisons situated on their frontier.

“The embargo was a serious evil to our country; its immediate operation is already severely felt in the injury of private credit. The extent of its consequences cannot be easily calculated. In a government subject to events like this, commercial operations must be always uncertain, confidence must be destroyed, and the price of insurance, and uncertainty of returns, will always damp the spirit of enterprise, enhance the price of imports, and lessen that of staple commodities. These evils are already felt. The capitals about to be invested in our lands, in our public institutions, and in loans to our inhabitants, are suddenly withdrawn, and the spirit of emigration to our territory is destroyed; *and a fall of at least twenty-five per cent. in the price of real estates, attests the misfortune of our country.* Measures more deeply to be deprecated, because they struck at the root of all a freeman ought to value in life—measures fortunately unknown in the history of the American people, and which, we devoutly pray, may be only cited hereafter to show the exemplary punishment that followed their adoption.

“On Sunday the 13th of December, Doctor Erick Bollman, a resident and house-holder of this city, was arrested by two military officers, under the command of brigadier-general Wilkinson; his papers were seized—he was denied the privilege of consulting counsel—and was immediately hurried out of the territory. Two other persons, (citizens of the United States,) were arrested by a similar order and confined on board a bomb-ketch, opposite the city. For some days neither the arrest of these last persons, nor the place of their imprisonment, was sufficiently known to justify any judicial steps for their release. At length one of them, (Mr. Ogden) remarkable for his height, was discovered from the shore—a proper affidavit was made, and a *habeas corpus* obtained [from judge Workman,] in obedience to which, and contrary to the express order of general Wilkinson, the officer of the navy in whose custody he was, brought him

before the judge, and he was released. The other, Mr. Swartwout, was immediately removed to more close confinement, and measures were taken, by frequently changing the officer of his guard, to avoid any proper return to the writ issued for his release.

“ An affidavit of the arrest of Bollman was presented to one of the judges of the superior court, on the afternoon of the 14th of December, together with the writ of *habeas corpus*, for his allowance; and it was urged by the gentleman who presented it, that the case was an urgent one—that the prisoner would probably be removed out of the reach of process by the next day. The allowance of the writ was at that time refused by the honourable William Sprigg, senior judge of the superior court, in order, as he alleged, that he might consult his colleague, and he not being at home, the motion for the habeas corpus was directed to be made in open court. On the following day, this motion appears to have been made by Mr. Alexander, supported by Mr. Livingston, both counsellors of the superior court; the writ was allowed. On Thursday the 18th of December, general Wilkinson, to whom the writ was directed, made his return, in which he set forth:—

“ The undersigned, commanding the army of the U. States, takes on himself all responsibility for the arrest of Erick Bollman, on a charge of misprision of treason against the government and laws of the United States, and has adopted measures for his safe delivery to the executive of the United States. It was after several consultations with the governor and two of the judges of this territory, that the undersigned has hazarded this step for the national safety, menaced to its base by a lawless band of traitors, associated under Aaron Burr, whose accomplices are extended from New York to this city. No man holds in higher reverence the civil institutions of his country than the undersigned, and it is to maintain and perpetuate the holy attributes of the constitution against the uplifted hand of violence, that he has interposed the force of arms in a moment of extreme peril, to seize upon Bollman, *as he will upon all others, without regard to standing or station*, against whom satisfactory proof may arise of a participation in the lawless combination.

(Signed)

“ JAMES WILKINSON.

“ After thus avowing his breach of the constitution and laws of his country, and declaring to the judges, sitting in their official capacity, that he would persevere in the same lawless course, he proceeded to denounce the two counsellors who had dared to question his proceedings. He demanded their immediate arrest—but though repeatedly urged, by the one who was present, to substantiate his charge, and though every effort since that period has been made by the gentleman accused to provoke enquiry into his conduct, we do not find that any proof whatever has been produced to criminate him; and we are therefore constrained to believe that this denunciation was intended to overawe those who might be inclined to extend their professional aid to the general’s victims.

“ This deduction derives additional force from the proceedings afterwards pursued with respect to Mr. Alexander. On the following day he was, by virtue of a military order signed by general Wilkinson, arrested in his house, and conveyed through the streets at noon-day under a strong escort of dragoons; he was paraded through the principal streets in the city, exposed to the pitying gaze of hundreds of the astonished inhabitants, and committed to close confinement at head quarters. From thence, with Mr. Ogden, who was a second time arrested, he was conveyed to some place then unknown. There is, however, unquestionable proof that on the 22d of January they were in confinement at Plaquemine.

“ The habeas corpus in the case of Bollman is the only one which was issued from the superior court in these cases of military arrest; the effect of that was rendered abortive by the alleged removal of the prisoner.

“ The other cases were prosecuted in the county court, where James Workman, esquire, presided. The history of those cases and the reasons why they were rendered ineffectual are contained in a report made by that officer to this house. That document demands the serious attention of the national legislature; and the tacit refusal of the governor of this territory, to give effective energy to the civil authority, will no doubt be examined by the executive of the union.

“ The picture however of our sufferings, degradations and injuries, is not yet complete. We have seen the citizen imprisoned, and his advocates dragged from the bar, denounced, im-

prisoned and banished; the violation of the sacred seat of justice itself was still wanting to give a finish and colouring, a glow of intense guilt to the group. This it received; for Mr. Workman, a few days after his communication was made to this house, was himself arrested, dragged to the guard house and imprisoned with Mr. Kerr (another gentleman of the bar, who had taken out the habeas corpus for Ogden,) until they were released by the prompt interposition of the district judge of the United States. We do not mean to be understood as vouching for the innocence or guilt of the several persons whom the commander in chief of the American army has arrested. It is, however, somewhat unfortunate that the guilt of none of the victims he has chosen from the bar or the bench was ever discovered until they had distinguished themselves by doing their duty in opposition to his tyrannical designs."

This memorial gave occasion to a spirited debate; but it was finally rejected by a majority of fourteen to seven.

The work whose title stands in the second place at the head of this article, is a report of the trials of judge Workman and colonel Kerr, on a charge of setting on foot an unlawful military expedition against the Spanish provinces in the neighbourhood of Louisiana. Kerr was tried the first. The witnesses examined on the part of the prosecution, were lieutenants Small and Murray, Mr. Bradford and colonel Bellechasse. They related various conversations which they had had on the subject of an expedition to Mexico, with both Kerr and Workman. The conversations and declarations of the latter were allowed to be given in evidence against the former, to show the extent and nature of the plan, but no further, on the authority of several cases cited by M'Nally. Mr. Clark and judge Prevost, were examined on the part of the defendant. The next witness called by him was major Nott, who stated that he had a considerable time before, become a member of a society called the Mexican association. "It was determined," said he, "that each member should endeavour to obtain every kind of information respecting Mexico, which might prove useful should we be permitted to carry on an expedition against it. I proposed that we should take possession of Baton Rouge—Dr. Watkins and judge Workman were opposed to the measure—Mr. Kerr approved of it. I offered to contribute 5000 dollars for the purchase of arms, on the condi-

tion that I should have the command of the expedition—to this Mr. Kerr objected, as he wished to head the attack himself. It was decided by the society that I should communicate the project to the governor, and in consequence of that determination, I proposed to him to take possession of Baton Rouge, provided he would add to the volunteers that I could procure, a small number of regular troops. He refused the offer, and told me that he had himself conceived and formed a plan for capturing Baton Rouge, which he would execute whenever he was properly authorised by government to act offensively—and that I should have a conspicuous share in the enterprize. In one of our meetings, a resolution was proposed and unanimously agreed to, which was to engage ourselves to support the local and general governments, and the laws of the United States. This every one who entered the society was understood to be engaged to. The society dissolved itself when it was known with certainty that the general government disclaimed all connexion with Miranda's expedition."

Dr. Watkins, the mayor of New Orleans, was the last witness adduced by the defendant. He deposed as follows:

"I have resided in Louisiana for upwards of ten years; the future destinies of that country have occupied much of my attention. I was in Europe about the time of its cession to France, and had an opportunity of learning something relative to the future intentions of the then government of France respecting it. Notwithstanding its transfer to the United States, I have always been apprehensive that France had not lost sight of her designs upon that quarter of the globe. The conduct of the Spaniards, and the intrigues of the French from the time the United States took possession of the country tended to confirm this opinion. Such was the political standing between the United States and Spain for better than two years after the former had taken possession of the country, that every body believed a war highly probable. This subject became the general topic of conversation in every circle, as well without as within doors; it involved the invasion of Mexico—the conquest—the emancipation—and various other dispositions of that country, according to the different views of those who talked upon the subject. After the president's war speech, as his address to congress is called, I with several other gentlemen, of whom the traverser

was one, believing a war almost certain, formed ourselves into a club for the purpose of collecting all the information in our power relative to the geography, population, and military force of the internal provinces, with a view of laying it before the government of our country, and offering our personal services in case of war with Spain. The greatest secrecy was necessary on the part of the members of this association, inasmuch as some of them have property in the Spanish dominions, and others were largely engaged in commercial speculations with the different provinces of his catholic majesty. Neither this association, or any one of its members, as far as I know or believe, ever heard of Aaron Burr's projects for severing the American union, or invading Mexico, either directly or indirectly, or of his or any other scheme or plan whatever for violating or infringing any one of the laws of the United States, or in the least degree troubling its peace or tranquillity, until the arrival of general Wilkinson here in the month of November last. On the contrary, this club was established upon the most virtuous and patriotic principles—never speaking of, or contemplating any expedition—the raising of one dollar—the levying one soldier—the purchase of one arm, or engaging one single man, unless under the sanction and by the express orders of the government of the United States. And all those with whom I have spoken upon this subject, talked of the expedition to Mexico (in the event of a war with Spain) authorised by the United States, an army of at least from 20,000 to 30,000 men, the number conceived adequate to such an enterprise. In the beginning of December, when I first heard from the governor of the territory the plans of Burr, I disclosed to him, the governor, without reserve, everything I had ever heard spoken of in this club about an invasion of Mexico. After the rising of congress in April last, finding that the senate of the United States had resolved upon settling their differences with Spain by negotiation instead of war, the society broke up, and have not since that time assembled, or to my knowledge or belief conversed upon the subject, otherwise than every other citizen of the country has done. It is not without pain, that I see an attempt to stigmatise an association, the object of which appeared to me praise-worthy.— And I hope to God, however I fear the contrary, that our country may never have use for its labours.”

Mr. Brown, the U. States' district attorney, supported the prosecution in a very able speech. He expressed in strong terms, his "conviction that all these self-created associations formed with a view to influence the measures of the general government, were calculated to produce the most pernicious effects. That their obvious tendency was to render the political machine complicated—to embarrass its operations—to give strength and asperity to party spirit—to molest our own tranquillity, and to jeopardize the peace of our neighbours. He deprecated the idea of transferring the power of acting against a foreign nation from the legitimate sovereigns of our own country to small portions of the community; and regretted that the professed object of the Mexican association should have been to correct the want of information, activity, firmness and vigilance in an administration which had shown no deficiency in those essential qualifications, and under whose guidance our union had advanced to an unexampled pitch of prosperity."

Mr. Kerr then addressed the court: his speech was humorous, pathetic and eloquent. The objects of the associates were more fully developed in judge Workman's speech, from which we give the following extracts:

"In this trial my cause is so mingled and connected with the cause of the defendant, that the same reasons which would have prevented him, would have prevented me also, from addressing you, if the state of Mr. Livingston's health had not deprived us of the aid of his powerful and splendid talents. I feel it now, however, particularly incumbent on me, for Mr. Kerr's sake, not to remain silent, after the efforts that have been made, on the part of the prosecution, to impute to him conversations and declarations of mine, with most of which he was entirely unacquainted. I think I can explain this to your satisfaction; and prove that in what I have said on these subjects, distinctly from him, there was nothing blameable, or if there was, that I am the only person who should bear any part of the blame.

"This doctrine of imputing to one man another's offences, to the extent to which some of the opposite counsel have endeavoured to carry it, seems to me absurd, monstrous and pregnant with the most dreadful consequences to society. The very case of the alleged conspiracy which has so long agitated this country, and spread discord and dismay among its inhabitants,

will serve to prove beyond all doubt, (if that conspiracy has been planned as public rumour relates) the fallaciousness and abominable tendency of the doctrine in question. Col. Burr, it is said, has set on foot a treasonable conspiracy against the government of the U. States. Different parts of his plan, we are told, are made known to different persons, according to the temperament of their minds—the character and zeal of their ambition—the degree of their willingness or reluctance to engage in such projects. Suppose that to one man he says, “Sir, my object is to overturn the whole government, and place myself at the head of a new one;”—To another, “I intend to separate the western from the atlantic states;”—To a third, “I mean to attack the kingdom of New Spain, no matter whether its sovereign is at peace with us or not—nor whether the government of the United States permit or oppose the project;”—To a fourth, “My plan, sir, is to conquer Mexico, provided our government will connive at the expedition;”—And to a fifth he may say, as we have done lawfully, laudably and with patriotic intention, “I wish to emancipate Spanish America, should Spain be at war with the United States, and provided our government will sanction the enterprise.” Suppose he has told all these persons, as it is rumoured he has done, that an expedition to Mexico must be spoken of to all the different classes of his associates, and used as a lure to draw in others, and as a pretext for concealing the objects really contemplated, and for providing the means of obtaining them. Then by the principle insisted on, all the acts and declarations of colonel Burr might be given in evidence against each of the persons to whom he should have revealed *any part of his plans*. What would be the consequence? That the innocent man who had contemplated a lawful project, as well as those guilty, in very different degrees of political misdemeanour, would all alike be branded with the infamy and subject to the punishment of traitors. Can any thing be more absurd, more dreadful than such a doctrine? Some of the counsel carry it still farther—They insist that the acts of persons whom we may have never known or seen may be evidence against us, if they are engaged in a plan similar to ours. By this rule it might happen that all the acts of col. Burr might be brought against several of the inhabitants of this city who are utterly ignorant of his views and proceedings. Newspaper report and

public rumour have for a long time past asserted that col. Burr was preparing an expedition for the invasion of Mexico, for which according to some accounts, he had the direct permission, and according to others the connivance only, of government. Any one of us who should have heard these reports and attached any belief to them, might say as Mr. Kerr said to Mr. Small concerning me, "Burr is engaged in the contemplated expedition to Mexico."—Shall a man for this, gentlemen of the jury, be brought to the scaffold?—I am sure you will give no credit to such testimony. You have heard of Gov. Claiborne's *expedition* for the conquest of Baton Rouge. He then agreeable to the principle, must have been *one of us*. In one of the instances, gentlemen, where it is attempted to fix my declaration of conversation on Mr. Kerr, the iniquity of the principle is most glaring. I allude to that part of the testimony of colonel Bellechasse, in which he states that I suggested the probability of accelerating the admission of this territory into the union, (under the authority of congress) as a free and independent state. On this subject Mr. Kerr and myself have generally held very opposite opinions. Neither of us was able to convince the other. To me it has always appeared that all the rights of American citizens should be extended, as far as the constitution will allow, to the people of Louisiana. Whatever doubts may have been entertained on the question of their right to these privileges under the treaty of cession, every event that has happened here for a long time past, proves the *expediency* of granting to the inhabitants of this territory what they so ardently desire and so justly deserve. It is of the utmost importance to the safety of the whole union, especially at this time, that their claims should be allowed. The real strength of every nation resides rather in the hearts than the arms of her people. A wise government should therefore always satisfy and even gratify their people, when it can be done consistently with policy and justice. Free governments especially should be attentive to these considerations. The measure I hinted to col. Bellechasse would unquestionable render the government of the U. States popular in this territory. This, in the event of war with Spain, I take to be of infinite importance: For from the constant intercourse and quick communication between this place and the Spanish provinces, which would of course become the theatre of

war, it happens that our opinions are soon communicated to their inhabitants. Whatever is related to them of the conduct and character of our government by their friends and former fellow subjects here, they religiously believe to be true: So that if the American government is beloved and popular in Louisiana, it will be highly esteemed in Mexico. We knew well the advantage—the incalculable advantage of having that country favorably disposed towards us should the war we expected take place. Was it then extraordinary that I, who believed a speedy rupture with Spain to be inevitable, should feel desirous of suggesting whatever might promote the popularity of our government, and thereby contribute to our success in the contest? That I wished the fame of the American nation to go forth, the advanced guard of her power?

“My observations on this subject, gentlemen, are not repugnant to the decision of the court on the legal question of the *competency* of the testimony. The court has determined nothing more than that the statements of these witnesses might be laid before you; but as to the *credit* to be given to them, or the degree in which they might affect either or both of the defendants, it was clearly laid down that your discretion was competent to decide.

“The legal principle, gentlemen, to be applied in the construction of the act, on which the present indictment is founded, is clear and evident: It is, that without a *criminal intention*, guilt can not be committed. This I take to be an universal principle of *criminal* law, at least whenever life or liberty is at stake: cases of this kind differ essentially from those arising from penal acts under which forfeitures of property may be incurred through mere neglect, without any criminal or fraudulent intention: but in these cases the proceedings are against the property and not against the person. Apply this principle to the section of the act on which the indictment is founded. “*If any person shall within, &c. begin or set on foot, &c. any military expedition or enterprise to be carried on from thence against the territory or dominions of any foreign prince or state with whom the United States are at peace.*” Nothing can be clearer than the intention of the legislature, from these expressions. The expedition must be *set on foot*, to be carried on, that is with intent to be carried on, against a prince or state with whom the United

States are at peace—that is with whom they are or may be at peace, *at the time* when the expedition is intended to be carried on. To prepare the means of assailing or annoying the enemies of the country can not of itself be criminal: there is nothing in it forbidden by the law of nations. It was not, as the attorney general has correctly remarked, to create any new offence that this statute was made, but to enforce the law of nations, and prescribe *a specific penalty* for certain violations of that law. The statute originated it is said in a certain enterprise set on foot during the French revolution by citizen Genet: but there is no resemblance between that case and the present. It was the avowed intention of his party to attack Florida and Louisiana *immediately*, although the Spanish government was at peace with our own: they never intended to wait until war should take place, or to require the permission of the government. Nothing of the kind was ever contemplated by them. On the contrary, Genet made actual preparations for immediate hostilities, and gave out commissions under the authority of a foreign state. Was any thing like this ever done or intended to be done by the defendant or any of the society to which he belonged? The testimony of Dr. Watkins and Mr. Nott has clearly established that no such action or intention can be imputed to us. Their testimony proves beyond a doubt that the society never intended to act unless in the event of war, whether declared, or actually existing without any declaration of war; nor even then unless with the permission of the president of the United States or his representative in this territory. This is the strong circumstance that distinguishes our association from all those to which it has been compared. Suppose, gentlemen, we had made *actual preparation* for our contemplated expedition; our case then would be exactly similar to that of the persons who, in the expectation of war, fit out privateers to be ready to cruise against the enemy's commerce as soon as war shall be declared or known to exist. This is always done previous to the commencement of every war between the maritime states of Europe. I do not believe that a man would violate any law of this country who should this day publish an advertisement declaring that he wanted to purchase a vessel to arm and fit her out as a privateer to be ready to cruise against the commerce of Spain as soon as that nation should be at war with the United States. Suppose the soldiers of

any of our volunteer corps were to declare or even swear to their commanding officer, that they were willing to march against West Florida, the instant war should take place, if the government would allow them? Would this be a breach of the law? Nay, I will go further. Suppose a volunteer corps were raised, equipped, armed and disciplined *for the direct and avowed purpose* of invading West Florida under the circumstances I have just stated, I maintain that their intended enterprise would be perfectly lawful. Where is the difference between that case and ours? In this, gentlemen, that we set on foot no expedition whatever: there is no evidence that we ever provided, or set about providing the means for any expedition; and if there was such evidence, there is abundant testimony to prove, that the intended expedition would have been lawful if ever it should have been carried into effect.—By a singular concurrence of circumstances it seems that not only the violators but even some of the supporters of the law are upon this occasion desirous of convicting the defendant. The one wishes for a conviction, as an excuse, as a palliation for their misconduct: the others insinuate that a conviction would prove to the world that the law has power enough to punish offenders without the intervention of military force. But why require any proof of this truth? Who doubts the power of the law? Is not this *trial* enough to show it? Is not the defendant in the power of the court? Has he ever fled from or endeavoured to evade its authority? Do you want to prove the strength of the law by punishing a man who never resisted the law? No, gentlemen, if the triumph of the law is the object desired, punish those who have violated her dignity, subverted her power, and in her very sanctuary insulted her ministers. Will it be a triumph for the law to inflict on the defendant further sufferings in addition to those which the violator of the law has already made him endure? No, gentlemen, the law would then be the handmaid of oppression. The injustice the defendant has already endured would be palliated—It might be said he deserved all that he had suffered. It is by an acquittal, gentlemen, you may show the strength of the law. By the acquittal of a man persecuted by power, you will prove that the law has still strength enough left for the protection of innocence.

“The circumstance, gentlemen, which led to the formation of our society, was as the witnesses have declared, the strong

probability of a war with Spain. The whole system of her policy towards us for many years back is sufficient to show that her design is to injure this country by every means in her power—whether of open war or secret treachery. No one can doubt the fact who reflects on the uniform tenor of her measures—her opposition to the acknowledgment of independence—her detention of the Natchez territory so long beyond the time when it was stipulated to have been delivered up—her long and persevering exclusion of American vessels from the navigation of the Mississippi and the Mobile—her occlusion of the port of New Orleans in violation of a solemn treaty—her opposition to the cession of this country to the United States—the continued series of insults and outrages committed under her authority since that event on the persons of our citizens, and on their property, on the territories, even on the dignity of the chief magistrate of the American republic. Does not all this show that she has formed and pursues a steady persevering system of hostility to the American states? Is it not evident that she deems their prosperity incompatible with her own—that unless she can destroy or diminish their rising greatness, she can not long retain these rich colonies, whose treasures still purchase for her a nominal independence, and still procure permission for her unfortunate sovereign to wave a shadowy sceptre, and wear the “likeness of a kingly crown?”

“The insults and outrages committed by the agents and officers of Spain, in our own neighbourhood alone, are so many and various, that it would require hours to enumerate them. I am sure it is unnecessary to recall them to your memory: They must have made an impression in it never to be effaced. A few of the more atrocious outrages it may be proper to mention, as they led to some proposals on the part of our society, for which instead of being arraigned in a court of justice, we ought to receive the approbation and applause of our country. You will remember, gentlemen, the intrigues of the Spanish officers and agents here; their vigilance and activity in seizing on every circumstance likely to produce discord and dissention among us;—their endeavours to create disaffection to the government. In other places much worse than all this was perpetrated by them. They have repeatedly invaded our territories; and seized and plundered and imprisoned our citizens. They have held by force

of arms a large and valuable country which the United States have bought, and paid for; and for which the congress of the United States have legislated. They have shut up the navigation of the Mobile, to the ruin of a great number of American families. A short time ago they invaded our territory on the Sabine and accompanied this injustice with insults and outrages almost incredible. A letter from governor Claiborne to governor Herrera, dated from Natchitoches, August 26th, 1806, a newspaper copy of which letter I hold in my hand, is filled with complaints of these abominable and provoking proceedings. In one part of that epistle gov. Claiborne observes "the above proceeding, sir," [viz. the invasion of our territory] "is not the only evidence of an unfriendly disposition which certain officers of Spain have afforded: I have to complain of the *outrage* lately committed by a detachment of Spanish troops under your instructions towards Mr. Freeman and his party who were ascending Red river under the orders of the president of the U. States, &c."—A little farther on, in the same letter, the governor adds, "This detachment of Spanish troops, whose movements I learn are directed by your excellency, did on their march commit *another outrage* towards the United States, &c."—Again, "I am unwilling to render this communication *unnecessarily lengthy*, but I must complain of *another outrage which has been committed under the eyes of your excellency.*" The next letter of governor Claiborne to the same officer affords additional proof of the insolence of Spanish hostility—and the extent of American forbearance. He states, "I continue to be of opinion that the advance of Spanish troops within the territory claimed by the United States, is evidence of an unfriendly disposition; nor can I perceive any thing in your excellency's letter which can justify or extenuate the offensive conduct observed towards Mr. Freeman and his associates, *or the indignity offered in the Caddo nation to the American flag.*" Only one more disgusting detail of this kind gentlemen and I have done. "I cannot," says the governor, "refrain from expressing my displeasure at the arrest and detention under your excellency's orders of the three citizens of the U. States, Shaw, Irvin and Brewster. *They are charged with no offence which would warrant imprisonment and transportation to St. Antonio. A state of actual war between our two nations*

"would not have justified your conduct towards those unoffending citizens." In this manner, gentlemen, have our good friends the Spaniards followed up their former invasions and depredations: In this manner have they completely justified our opinion of their intentions towards us: In this manner do they proceed, heaping insult upon insult, and outrage upon outrage. And yet does the indictment state that this power, which so flagrantly insults and attacks us, is *at peace* with the U. States. In a paper before me, styled an answer or address to one of governor Claiborne's messages or speeches, the addressers declare that the king of Spain is in *amity* with the United States—God deliver us, gentlemen, from such a friend. And yet strange to tell, gentlemen, if any man shall talk of war against that good king, if any man shall even *imagine* the invasion of his territories, he is denounced and half convicted of treason. We are careless about the defence of our own territories—all our anxiety is to protect those of his catholic majesty. It seems as if some invisible Spanish influence hangs over us. On all sides we hear of the friendship of Spain—every mouth is filled with expressions of indignation against those who contemplate the invasion of any of her possessions—even our own territorial government is to be new modelled after the Spanish fashion. We are told of the inconvenience of assembling juries—the *habeas corpus* is represented as something fit only to protect conspirators—the liberty of the press too is another nuisance which it has been found necessary to abolish for the present. Whatever the design of all this may be, its tendency is obvious.

"Some of the aggressions, gentlemen, which I have brought to your recollection amount to more than a belief that war with Spain was inevitable: They prove that Spain *was actually at war with the United States*. The invasion of the Mississippi territory and the seizure of several American citizens there by the officers, and under the authority of Spain, was not merely a just cause of war—it was an unequivocal, downright *act of hostility*:—*It was war itself*. The persons seized by the Spanish government were liberated speedily by lieut. Wilson. That brave young officer, as soon as he knew of the outrage committed on our territory and its citizens, waited not for superior orders, but with a prompt and daring wisdom, worthy of his country and his profession, attacked the Spanish guard, defeated

them, and set their American prisoners free. Suppose these prisoners had been taken into Baton Rouge, lieut. Wilson would probably have attacked and captured that fort: and his country would have applauded his decision and his courage. And shall the defendant be punished for only proposing and asking permission to do the same thing, very soon afterwards and in consequence of the same most provoking outrage? War between nations may exist, gentlemen, without any declaration of war. When a nation exercises open violence against another state, she is at war with it. In one of the cases reported by Dallas, the supreme court determined that the French republic was at war with the United States, although no declaration of hostilities had been made on either side. The French republic plundered our property; but their depredations were nothing compared with the insults and outrages which for two years past we have been continually receiving from Spain. The very act of holding by force of arms that country between the Mississippi and the Perdido, which congress have claimed, and justly no doubt, because they have legislated for it, is a permanent measure of hostility—an unequivocal and continued act of war. It is American territory, and every American citizen has a full right to take it and defend it for his country. Mr. Attorney General is pleased to question the sincerity of our declaration, that we meant not to commence operations without the authority of government. Our application to the governor for his permission he conceives to be an aggravation of the offence, because he says neither governor Claiborne nor the president of the United States was authorised to declare war. Gentlemen, we know very well that neither of those officers possessed such an authority: but that it belongs to congress alone. But cannot war be authorised without being *publicly declared*? Is it not the constant practice of states when they are determined on war to strike a blow against the enemy before he is aware of their intention? If the permission of governor Claiborne would have satisfied us, it was because we were convinced he would not give it, unless in consequence of orders from the president, founded on an act of congress passed with closed doors. The congress often transact business in secrecy,—and on what occasion could secrecy be more requisite than in declaring war against Spain,—to enable us to seize instantly on her important posts;—to let the foe feel the

lightning of the national vengeance before its thunder was heard?

“ The act of congress, legislating for the Mobile district, did in my opinion authorise the president immediately to take possession of all the country included in that district. Was it not the president's duty to carry that law into execution? And how could he discharge that duty, if the district in which it was to be performed was not within his power? Perhaps I am in error—but nothing appears more evident to me than that when congress legislated for the disputed territory, they directly authorised the executive, or whoever he might appoint for the purpose, to take that territory even by force of arms, if it could not be otherwise obtained. Where then, gentlemen, is the intentional offence of proposing to the governor to attack Baton Rouge? Let it be even admitted that our opinion on this subject was in point of law erroneous: are we to be punished as criminals because our zeal for the country was stronger than our judgment? The proposition made by major Nott to the governor proves better than any declarations whatever, that our intentions were, as they were stated to be to all with whom we communicated concerning the intended enterprise, lawful and honourable. The introduction of the words *lawful means* into the promise made by the associates has been animadverted upon, and I think with unjust severity. Men it is said, who associate even for treasonable purposes may, to allure others to join them, declare they intend to use no other than lawful means. This may happen undoubtedly. A man who assures you that he is a man of honour may prove to be a knave or a scoundrel—but are all other men who tell you they are men of honour to be suspected on that account? Because we say that our purposes are lawful are they *therefore* to be believed criminal? The surest way, gentlemen, to judge of men's real intentions is by their *actions*. To this unequivocal test I appeal in the defendant's cause—we contemplated an attack on Florida—we believed that Spain was at open war with us, and that of course we had a right to attack her dominions—we could find, as we thought, men enough to seize upon Baton Rouge, and Mobile—yet we would attempt nothing without the direct, explicit permission of government—the demand of this permission proves that what we had said to our associates about lawful means was strictly true—the declining to

act without the permission of government proves that our lawful intentions were not to be disturbed or perverted—we abstained, not merely from doing what was unlawful, but from attempting any thing that could in the slightest degree displease our government. Is any thing further requisite for our justification? If there is, the testimony before you will supply it. You have it in evidence that as soon as it was known here that Miranda's expedition, to which public rumour had for some time given the sanction of government, was unequivocally disavowed by them, and that hopes were entertained of accommodating all differences with Spain by honourable negotiation, our society was immediately dissolved by the unanimous consent of its members—you have it in evidence that the objects contemplated by that society were completely abandoned, and ceased to be the subject even of conversation. What more, gentlemen, can be required to satisfy you that all our intentions and objects were lawful, honourable and patriotic? You see, gentlemen, that in this cause we take high ground—if we were pinched in our defence, we might say that whether our *intentions* were good or bad, we could not be convicted of any offence, inasmuch as these intentions were never carried into action. But no legal distinction of that kind, no evasion or subterfuge whatever is necessary for our defence. We have nothing to deny—nothing to palliate. We do not excuse but justify our conduct. We hold it to be not only lawful, but meritorious. These observations apply more particularly to what passed in the society, and to what was done seriously and advisedly by its members—for as to the trivial or jocular conversations which have been related to you, I am sure you will not think them worthy of the slightest notice. The counsel for the prosecution have had the candour to treat these conversations as they deserved—to lay no stress whatever upon them. The very little impression which they made upon the persons who say they heard them, and who never thought them worth repeating till after the lapse of many months, is a convincing proof that they ought not to make any impression upon you at this time. If every light, and vain remark made at table is to be considered serious evidence in a court of justice, few men in New Orleans, at least, would pass unblamed.

“Of the conversations which have been related to you by the witnesses on the part of the prosecution, it is not possible that

many of them can have been serious. You know the defendant too well; the testimony which he yesterday gave you of his talents and his knowledge, forbids the supposition that he could have uttered any of the nonsense imputed to him, except in a moment of unguarded levity and without any serious design. To be assured of his innocence in this respect, you have only to fathom his understanding. Men of talents do unquestionably talk nonsense at times like other people; especially in social parties, where the mind unbends, and where sober discretion gives place to the unbounded confidence which hospitality has hitherto held sacred. The testimony of Mr. Bradford, which was given in a manner so clear, ingenuous and candid as to command the assent of all who heard it, furnishes additional proof of the lawfulness of our intentions. From Mr. Small's evidence it would appear that the plan communicated to him by Mr. Kerr, was the very same in its nature and objects as that communicated by me to Mr. Bradford. And what was that? A plan perfectly lawful—a plan to offer our assistance to the government before they could assemble a sufficient regular force for offensive operations. Something has been said about hoisting a Mexican flag in West Florida: had the government permitted the contemplated expedition to Mexico, they would of course permit the best means of carrying it into effect. If you told the people of that province that you intended to make them an independent nation, you ought to use every method in your power to convince them you were in earnest. But they would be apt to suspect that your real object was conquest, and not emancipation from colonial subjection, if you marched under the banners of your own country.

“The attorney general urges that the offer or proposal of certain rank and commissions to individuals is a proof that we intended to act independently of government; inasmuch as government alone have the right of granting commissions—This objection is removed by considering the nature of the expedition we had in view. It was contemplated to be a *private expedition* under the sanction of government. Such expeditions have been often allowed by the nations of Europe. Almost all the provinces, now the states of America, were taken possession of and settled by private adventurers. A few years ago when England was at war with Spain, a British officer (Col. Fullarton)

proposed an expedition of this kind against Peru—The associates were to find men, arms and money—The government were to furnish nothing more than transports and convoy: and it was stipulated that the associates should choose their own officers, and in case of success be permitted to establish a free colonial government, under the protection of the British empire. The plan was on the whole very similar to ours: and what is more, *it was adopted*, and would have been carried into execution, but from some unfavourable political events. We presumed that such a plan would be countenanced by government as affairs then stood. The president seemed strongly inclined for a Spanish war, but the congress appeared unwilling to incur the expenses to which war might lead. In this state of things there was surely nothing criminal in imagining, or proposing a plan by which the enemy might be attacked and deprived of a large portion of his dominions and resources, without burthening the people of America with additional taxes. As to commissions and military rank, you all know, gentlemen, that it is one of the conditions on which volunteer corps are raised, that they are allowed to choose their own officers:—That we should expect to enjoy the same privilege was very natural; and this fully explains what the Attorney General considered so strong an evidence of our unlawful designs.

“ We are asked, gentlemen, why we did not communicate the plan to government in the first instance? For this plain reason that the plan itself was rather contemplated than formed, and that we knew not how far there was any probability of carrying it into execution if it should be approved. Whenever any scheme is formed, requiring the co-operation of several persons, the first step taken is to enquire whether a sufficient number of enterprising individuals can be found. If you have any project in view,—for instance, to cut a canal,—to improve the navigation of a river or the like, you enquire, before you apply to the legislature for an act authorising the scheme, whether you can procure men and money enough to effect your purpose: Otherwise you are regarded as an idle projector. In our contemplations there was nothing worthy the name of a settled plan farther than what major Nott and others communicated to governor Claiborne.—As to all other plans, the desire manifested by government to avoid war with Spain, put an end to them entirely. On

this point then, gentlemen, as on every other, the conduct of the associates proves the purity of their intentions. That secrecy that appears to the prosecutor so suspicious, is explained by our actions in the same manner as by the testimony we have adduced. We endeavoured to keep our plans secret from those only to whom it would have been improper to have divulged them, even if those plans had received the fullest sanction of the government.

“ It is said that associations like ours are dangerous in a community:—Some we are told may associate on the borders of Canada with a view to attack the British—Others may associate for the purpose of falling on the Creeks or Cherokees. But, gentlemen, if there were a thousand of such societies they would do no injury to the country, provided they were formed on the same principles and actuated by the same motives as ours,—determined to act only in obedience to the government. If such was their principle they might in times of danger be of high national utility—they might infuse a military spirit into the nation:—and thus become much more formidable to her enemies than any standing army. Societies of this description, form a very powerful engine, of good or of evil, accordingly as they are directed. Under the sway and guidance of artful and ambitious men, they may undoubtedly be diverted from their original purposes and made the instrument of extensive mischief. The best institutions may be abused. To the liberty of the press you owe in a great measure the independence of America: To the same cause may be attributed most of the evils and atrocities of the French revolution. The Masonic Societies have been productive of extensive charity and beneficence in the world; yet in some countries they have been perverted to the most abominable purposes. But recollect gentlemen, you are not now trying whether our association was prudent or imprudent—mischievous or beneficial—but whether it was lawful or unlawful. The language of the counsel would in my opinion be addressed with much greater propriety to the legislature of the nation, who have the power of making new laws, than to a jury of the country, who have no other power than that of deciding according to the laws already made. The question is not now whether it would be expedient to pass a law to suppress these political societies, but whether the statute as it stands has already declared them un-

lawful. On this point it is impossible to entertain a doubt: that statute has not a word which prohibits them.

“The Attorney General has given a just and eloquent description of the deplorable state to which we have for some time past been reduced. The picture he drew was by no means too highly coloured. Confidence is indeed banished from our society: The power that oppresses us reigns by terror of the most atrocious and dreadful kind. The public mind is agitated and distracted by the merciless suggestions of fear. We hear of nothing but suspicion, delation, and proscription. Light, unguarded or unmeaning expressions are converted into proofs of the blackest guilt. Every word is borne by some infamous or malicious tell-tale to the government house or to head quarters. Spies and informers strut and threaten in our public places. Our looks, our demeanour, even our meditations are watched and scrutinized: Our very tables are beset with snares; the sanctity of hospitality is violated, and our guests become our accusers. No conduct, however blameless or circumspect, no character, however distinguished for probity and patriotism, can now shield us against the shafts of calumny. We are asked if we have not contributed to this state of things;—if our society has not occasioned much of the abominations we are obliged to witness and endure? I answer with confidence, No.—No ingenuity, no sophistry can trace any of these evils to that patriotic institution. It existed here for nearly eighteen months, and no one ever heard till this day that it was productive of any discontent or dissension in the community. Neither, since its dissolution, have any of its members disgraced themselves by any of those infamous proceedings which occasion our sufferings. Not one of the Mexican club has yet appeared in the long list of tale bearers, spies and informers: Mindful alike of the dictates of public virtue, and the obligations of private honour, not a man of that society has suffered his soul to be corrupted by fear, or appalled by terror. Such, gentlemen, was the society which is represented as the source of our calamities, and to give terrific importance to which, the rich mine of ancient history has been explored for odious and unjust parallels. The name of Cataline, not merely the name of a conspirator, but of conspiracy itself, and every thing detestable in conspiracy, has been introduced;—cruelly introduced to suggest a comparison between the de-

fendant and one of the blackest traitors that ever disgraced the human form. But, gentlemen, where is the evidence which can in the least warrant the vile allusion? Did Mr. Kerr conspire against the safety of the Republic, or against the life of Cicero? Were his associates men of depraved morals or of desperate fortunes? Were Dr. Watkins and Major Nott, the Lentulus and Cethegus of the conspiracy? No, gentlemen. They are men of high standing and character in society.—Men whom none have ever yet blushed to call their friend and receive as their companion—Men whom none have yet ever dared to asperse—Men so armed in honesty and honour, that though a hundred Catalines were to conspire against their reputation, even the sharp stiletto of calumny would recoil blunted on the assassin's hand. Yes, gentlemen, if any have conspired against the innocent; if any have in midnight council meditated the murder of reputation; if any have put evidence to torture to wring matter of accusation from friend against friend; if any have conspired to employ the laws of their country as instruments of oppression and malignity;—Well is the name of Cataline revived:—We can find owners for it in abundance.

“On the testimony adduced by the prosecutors it is not necessary to add many observations to those which have been already made. The circumstances stated by Mr. Murray appear never to have made any impression on his mind. It is difficult to remember with precision conversations which have taken place at such a distance of time: but if I had heard that I had projected a voyage to the Moon, I could not have been more astonished than at the relation of some of the extraordinary military marches which, for the first time, I hear that I have proposed. You have been told correctly, gentlemen, that an expedition to Mexico has long been the theme of my meditations. The best efforts of my mind have been given for some years past, particularly since I have resided here, to obtain correct information concerning that country: and I really think it is much more probable that the witnesses to whom I allude may be mistaken, than that I should have ever thought of joining Miranda in Caraccas by the way of Mexico, or of marching to the city of Mexico by the way of Santa Fe. If these witnesses have been mistaken in one instance, they may be incorrect in another: and, considering, that the evidence laid before you by the prosecutor

consists wholly of discourses and conversations, I hope this observation, founded on fair inferences, will have its due weight.

“ It has been urged, gentlemen, that to establish a society for the purpose of obtaining information concerning countries locked up by their masters from the general view;—and of spying out the nakedness of our neighbours,—is calculated to draw upon our country the calamities of war. This opinion has at least the merit of originality; I believe this court is the first place in which it was ever broached. Who ever before heard that it was improper to seek information, relative to neighbouring nations, whether statistical or geographical, or belonging to subjects of history or any other branch of knowledge? Have there not been hundreds of volumes published on the state of those very provinces with which we endeavoured to make ourselves acquainted? A German traveller, baron Humboldt, was very lately permitted to make the tour of those colonies, to examine them minutely, and return to Europe to publish his observations. Prudent governments are always careful and anxious to obtain in time of peace every information that may be useful to them in time of war. They do not scruple to procure maps of their neighbour’s countries, draughts of their fortresses, charts of their coasts and bays and harbours: They adopt the good old maxim, *if you wish for peace prepare for war.*

“ It has been suggested that some members of our society went much greater lengths than others; and it is even insinuated that we were connected with persons, accused of forming treasonable plans for the separation of the union. If you believe the testimony you have heard on both sides of this cause, you will be satisfied that no plan of the kind had or could have any connexion with ours. We meditated a lawful expedition to Mexico, by means of the citizens and resources of the United States: an expedition which, to give it a fair prospect of success, would have required from fifteen to twenty thousand men. Could any person who had formed such a design be so mad as to connect it with plans *hostile* to the United States—hostile to the very country from which alone his supplies and resources could be drawn; odious to the people by whom alone he could be supported, and destructive to the government whose countenance and patronage would be essential to his success? I can easily conceive that a man may have formed a plan of separation, or a plan for invad-

ing New Spain: but they are obviously incompatible the one with the other. What force would be requisite for the single enterprise of separating the western from the atlantic states, admitting even that the western states were desirous of the separation? Nothing less I presume, than a force sufficient to resist all the armies which the whole population of the atlantic states could furnish for the preservation of the union. And if such a force could be levied in the upper countries, could they spare enough for the conquest of Mexico besides? Of a kingdom a thousand miles distant, containing upwards of six millions of inhabitants? I was sufficiently surprised when I heard it gravely stated that Mr. Burr was raising SIX THOUSAND men in Kentucky to divide the union, to seize and revolutionise and pillage Louisiana, and likewise to conquer Mexico—all with six thousand men, aided by the five or six hundred troops under gen. Wilkinson's command: that statement, gentlemen, surprised me not a little; but to find that any one believed it, excited in my mind extreme astonishment. Another and not much less absurd tale was prevalent among us: This was that the expedition to Mexico was to precede the attack on the United States, or at least on that part of their territory west of the Mississippi;—that the adventurers, not satisfied with the kingdom of New Spain, (the fairest and richest portion of the globe) should abandon the fertile and ever verdant vallies of Mexico for our cypress swamps and morasses, and gratuitously and perfidiously attack their old friends, and make an eternal enemy of a nation whose friendship would at all times be their best security; and without whose aid they could not hope to resist the force which undoubtedly on the first opportunity would be sent against them from Europe. But it is easy to see the design and purpose of these vile fabrications: the hirelings of the Spanish government know that an honourable expedition to emancipate Mexico from the Spanish yoke is a popular and favourite theme in America; their policy is therefore to destroy those sentiments, and to render the subject odious by associating it with the abhorred ideas of treason and pillage. That no illegal, immoral, or dishonourable means were ever contemplated by us for carrying any plan into effect is evident from the very terms and obligations prescribed to those who entered into our society. Major Nott and Dr. Watkins state that all the members of that society engaged

The last of the three publications to which we have called the attention of our readers, contains a well written narrative of the events which occurred in New Orleans, during the short but remarkable period specified in the title page of the work.

ON THE PROMULGATION OF THE LAWS.

IT has long been a subject of complaint among the profession, that the laws of the federal legislature are not to be procured in a convenient form until a considerable time after the end of each session. It is true, they are published in a few newspapers in each state, generally when it suits the convenience of the editors; but files of newspapers are very inconvenient appendages to a lawyer's library, and indeed to that of a magistrate or other citizen whose duty or interest requires him often to recur to the text of the law. This serious evil, instead of lessening appears of late to have increased, for the laws of the last session of congress, although a full twelve-month has elapsed since the most of them were enacted, are not to be procured in a pamphlet form in any bookseller's shop in this city, and we presume they are not to be purchased any where else in the United States. A remedy is loudly called for, and we hope it will be afforded to us from some quarter.

Until lately, indeed, it was difficult even to procure a complete collection of the federal laws. Congress very wisely, by their act of the 18th of April 1814, ordered a new edition of the national code to be published, and made it the duty of the secretary of state and attorney-general, to prescribe the plan and manner in which the work should be executed. The public are now in possession of the four first volumes of this new edition, and the fifth, which will contain a digested index of the whole, is expected shortly to appear. We cheerfully offer our tribute of praise to this excellent performance. The plan which is prefixed to the first volume, and which appears to have been strictly

followed in the execution of the work, was devised by the present attorney-general, Mr. RUSH, and approved by the secretary of state. It is, in our opinion, a model for all future collections of the same kind. It has reduced to the smallest possible space all of the immense mass of labours of the continental and federal legislators since the revolution, as can in any wise be considered as practically useful, and has even given room for the *repealed statutes* which are so often looked for in vain in modern editions of existing laws, and which should always be preserved. Nor have the private acts been excluded, numerous as they are; and when we add that these volumes embrace the whole of the *American Corpus Diplomaticum*, or collection of treaties, and the copious extracts from the journals of the old congress which compose the first volume, it is impossible to imagine a more complete code or body of American federal law. The attorney-general, we think, has very judiciously excluded notes of adjudged cases from this edition. The decisions of tribunals should be sought for in the books of reports, and the questionable commentaries of an editor should not be suffered to disfigure the authoritative text of the laws.

While we freely bestow upon this work the praise that is justly claimed by its excellent execution, we may be permitted to express our hope, that however pleased we shall be to see a sixth volume equally well arranged, we shall not have to wait until congress shall have passed a sufficient number of laws to form an octavo volume of seven or eight hundred pages, before we can expect to possess those that have been and will be passed in the intermediate time. If a spirited bookseller cannot be found to undertake to publish a sufficient number of copies of the laws at the end of each session of the legislature, at least to supply the profession, which is sufficiently numerous through the United States, we would respectfully submit to the members of congress, whether some legislative measure could not be devised to effect this most important object; we mean A TIMELY AND ADEQUATE PROMULGATION OF THE LAWS.

Not many years ago, the legislature of Maryland adjourned, without passing the usual resolution for printing the laws of the state. This was owing to a difference of politics, prevailing in the two houses; in consequence of which the people were left in ignorance a whole year, because neither party had sufficient

liberality to allow a heretic printer, to gain a few dollars. Unless some more effectual means are devised, to promulgate the laws, we shall soon deserve the ridicule which Cicero applies to the Roman government, at a period when, he says, the calendar was so profound a mystery, that application was usually made to a few lawyers who were in the secret, in order to ascertain the days of pleading. *Suetonius* relates of *Caligula* that he published the laws, *minutissimis literis et angustissimo loco*; as a way and means of raising money upon the people, who, from the ignorance which this practice occasioned, incurred forfeitures, by which the revenues were largely, though disgracefully augmented.

During the *interregnum* in Maryland, to which we have just alluded, we witnessed an occurrence, which is worth mentioning. In the trial of a certain cause in the county court of Baltimore, one of the counsel intimated, that a law had been passed at the recent session of the legislature, the provisions of which affected the case at bar. Several of the advocates, who were present, were members of that legislature, but no one would venture to state the law precisely, or even to affirm that any such act as was represented, had been passed. At length one gentleman—the late Mr. *Donaldson*, who was killed in the attack on Baltimore, said—he was positive that it had passed the senate—to which he belonged. Judge *Hollingsworth* observed, in a laughing manner, that, *that* was “*prima facie* proof, to him, that it had been rejected by the other House.”

THE
AMERICAN LAW JOURNAL.

The freedom of the navigation and commerce of neutral nations, during war, considered according to the law of all nations, that of Europe, and treaties.

An historical and juridical Essay to serve as an explanation of the disputes between belligerent powers and neutral states, on the subject of the freedom of maritime commerce.—London. and Amsterdam, 1780.

(Translated from the French, for this Journal, by Charles J. Ingersoll, Esq.)

PREFACE

BY THE EDITOR OF THE FRENCH EDITION.

THE present war, of which the ocean is the principal theatre, three, or it may be said four maritime powers being engaged in it, carries desolation and ruin into all parts of the globe. This, which is a common effect of all wars by sea, is also that in the prevailing one which the wealth of the English North American colonies has first lighted up between them and Great Britain, and which afterwards occasioned the wars between that crown and those of France and Spain. Such a war disturbs and destroys the navigation and maritime commerce, not only of the subjects of the belligerent parties, but likewise of those of the princes and states who take no part in it.

For the belligerents, for a long time past, have possessed themselves of the right of restraining, during war, the maritime commerce of neutrals, and of interdicting their transportation of certain goods to the countries of enemies. This pretended right may be reduced to four principles, as follows:

1. Maritime powers, when they make war against each other, publish, in the beginning of it, ordinances or notifications, wherein they prescribe to neutrals the laws which the latter are to observe in their commerce with the enemy, forbidding the supply of certain sorts of merchandises, particularly arms and munitions of war.

2. Consequently they cause the stoppage and seizure of the neutral vessels on the high seas, whose cargoes consist in whole or in part of goods prohibited by their ordinances.

3. In like manner they cause the stoppage and seizure of neutral vessels laden with enemy's effects, unless the contrary be stipulated between them and the sovereigns of the owners of those vessels.

4. They establish tribunals which take cognizance of the prizes, declaring them, according to circumstances, either liberated or confiscable.

These proceedings on the part of belligerents have been, in all maritime wars, an abundant source of disputes and quarrels between them and those neutral states, the cause of which lies in the right attributed to themselves by the maritime powers to fix fetters during their wars on the navigation and commerce of neutral nations. Hence it is that the latter incessantly complain of the injustice and violence done to their trading citizens; as on the other hand it is pretended that nothing is done but in exact conformity to justice. Thus the two parties are not agreed as to what is permitted or not by the right of war.

In all that the belligerents undertake against the neutral nations and traders, they found themselves on the law of nations. But this expression being vague and liable to be taken in several senses, the author of this Essay has fixed the

idea of it in the first section; wherein he treats of the difference which there is between the universal law of nations and the European law of nations; showing that the latter being founded on the positive principles and received usages of a general consent of the European nations, may be changed in the same manner.

In the disputes which constitute the subject of this Essay, the question being concerning the commerce of merchants, subjects of neutral states, and the pretended power of belligerents to stop neutral vessels on the high seas, it has been deemed proper to touch somewhat on the rights of neutral people, of their free commerce and its foundations, and also on the liberty and the empire of the seas, which is done in the second, third and fourth sections.

The author has therein established the principles, according to which he maintains in the fifth section that conformably to the universal law of nations neutral states have an absolute and unlimited freedom in their navigation and commerce, in time of war as well as in time of peace, and for all kinds of merchandise, even for arms and munitions of war, and therefore that the belligerent parties have no right to prescribe laws to them in these matters, to interdict certain sorts of merchandises, nor to seize under any pretext whatever their vessels on the high seas, nor finally to exercise a jurisdiction over these vessels, their cargoes and owners.

But as the belligerents, far from recognising this absolute freedom of the commerce of neutral states, have rather assailed it in all maritime wars, the author takes occasion, in his sixth section, to remark on what has been the practice of the ancients in these affairs. He cites the laws of some Roman emperors, and the constitutions of several of the popes, by which it was forbidden to sell arms and other articles suitable for war to the enemies of the Roman empire, and the infidels as enemies of the church. Hence has been introduced throughout Europe the usage by which the belligerents interdict the commerce of their merchandise to neutrals.

The powers of Europe having begun to make treaties of commerce with each other, it was therein stipulated by the contracting parties that their subjects should not furnish to the enemies of each other, either arms or other munitions of war, which, to this end, are very exactly specified. Another essential point of these conventions regards enemy's goods laden on board neutral vessels. The rule was adopted in the treaties that enemy's effects found on board neutrals were confiscable, and, on the other hand, that neutral effects laden on board enemies should be free—The ownership alone of the merchandise was considered. But this usage having afforded the privateers of the belligerent parties an occasion or a pretext for visiting the neutral vessels, which they often made use of to commit depredations and other acts of violence, this rule has been altered since the middle of the last century, and another established, according to which, a neutral vessel neutralises the whole cargo, though it be in part or altogether enemies' property, as in return, an enemy's vessel, with all the cargo are confiscable, though belonging to a neutral. Here nothing was regarded but the ownership of the vessel, and not the goods. This new rule was adopted, with few exceptions, in all commercial treaties concluded from that time till now. All this composes the contents of the seventh section.

The usages and principles adopted in the commercial treaties of European powers have given existence to the law of nations in point of commerce; and the convenience of all these treaties, or the greater part of them, is in proof. According to law, arms and munitions of war are contraband goods, which neutrals are not allowed to carry, in time of war, to the enemies of either of the belligerent parties; who had moreover a right to seize and confiscate enemy's effects found on board neutrals. But this having been altered by the establishment of a new usage, which declares neutral vessels free, together with their cargoes, and condemns enemy's vessels with all on board to be confiscated, a new point is thus made in the law of European nations, which has subsisted till

now. Thus the jurisdiction of the belligerents over the prizes made by their vessels of war or their privateers is authorized by this right. But as in some of the Courts of Admiralty the judicial proceedings are very strange, irregular and entirely contrary to the known principles of jurisprudence, the sovereigns, whose vessels and effects are put on their trial before these tribunals, are not obliged to recognise the sentences, often unjust and partial, which emanate from them.—The law of European nations approves likewise the ordinances and notifications, which belligerents have published at the commencement of war, but only for arms and munitions of war, all other merchandise remaining free and permitted. By all which it appears that the absolute freedom of commerce which the universal law of nations gives to all people has been extremely restricted by that of Europe: which is explained in the eighth section.

The proceedings of belligerents against neutrals having at all times produced controversies and disputes between them, an historical abridgement is given in the ninth section of many remarkable cases of these sorts of affairs, and more particularly of the contests which took place in the year 1752, between the kings of Great Britain and Russia, with an outline of the reasons advanced on both sides.

In the tenth and last section the author has added some observations to which he could not assign a convenient place in the preceding parts of the work. He has reported examples of the freedom of commerce sometimes granted by belligerent parties to their respective subjects in the midst of war. He has shown the injustice of the seizure of enemy's goods on board of neutral vessels, between whose sovereigns and the belligerent parties no treaty of commerce exists. This proceeding forming a complete contrast with the new European law of nations, the author maintains that all neutral states have a right to demand of the belligerents that they shall treat, in such a case, their commercial subjects agreeably to the new European law of nations, and not, as the latter pre-

tend, according to the ancient. He has finally shown how advantageous a code of the right of war and marine made with the common consent of the princes and states of Europe would be, as well for the preservation of the just rights of neutrals, as for restraining the too enlarged pretensions of belligerents, and in general for the freedom of the commerce of all the people of Europe.

Such is the plan which the author has pursued in this essay. He has not been checked by the opinions of the learned, even those most celebrated who might differ from his principles; but he has treated his subject according to his own ideas, consigning the whole to the judgment and discretion of the equitable and impartial reader.

Freedom of the Navigation and Commerce

OF

NEUTRAL NATIONS, IN TIME OF WAR.

INTRODUCTION.

THE troubles of war which so often agitate Europe owe their birth, either to disputes which concern only the persons and the rights of sovereigns, and do not concern their people, or to offences by which the people interfere with each other in their property, their possessions or their rights. A distinction may be formed from them between the *wars of princes* and those *of people*. (a) The former most frequently constitute the misfortune of monarchical states, and the latter are an incon-

(a) This distinction is not received, to my knowledge, by those authors who consider these matters. Yet it may serve to decide some questions often debated; for instance, whether a duel, to which princes in former times have challenged each other, by way of avoiding or terminating a bloody war, should take place: and whether in a kingdom, wherein affairs of war and peace are within the province of the legislative authority, the legislature is bound to consent to a war, and bear the expense of it, when the subject of the war does not regard the state at large, but merely the chief. In Germany, the war of the Spanish succession in 1702; that for the election of a king of Poland in 1753; and especially the two last wars against the Turks in 1716 and 1737, deserve to be considered in this point of view.

All Louis XIV.'s wars except those against the piratical African states, were wars of the prince; those of the United Provinces were national wars. However, it is not pretended to be denied that the wars of monarchs are not also national wars, as those between France and Great Britain have almost always been.

venience of republics. Both these species of war agree however in this, that they are made at the expense of the subjects, who are obliged to sacrifice their property and their lives. Yet they are not the only ones who experience the calamities of war; by which a great many others suffer, although they take no part in the quarrel which caused the rupture. This is more especially the effect of war between maritime powers. The commanders of the naval forces and the privateers of the belligerents incessantly annoy the commerce and navigation of foreign merchants and the subjects of neutral states, by stopping and seizing their vessels on the high sea, and thus turning them from their voyages. The cause or rather the pretext for so violent a proceeding, is sometimes the mere possibility that there may be contraband or enemy's goods, both of which are deemed good prize. If the captor believes that he has ground, he sends the vessel into a port of his sovereign, in order that it may be judicially condemned in his behalf. By this judicial proceeding the vessel is often detained for several months, and even a whole year, which occasions a considerable loss to the owners, by loss of time, hindrance of an advantageous sale, and the damage or total depreciation of the goods, without reparation for these losses even if the captor be condemned in costs and damages. This seizure of neutral vessels has often produced great disputes between neutral and belligerent powers. At the end of the war of the Austrian succession, the States General of the United Low Countries and the king of Prussia made very considerable demands on Great Britain, in behalf of their subjects, whose vessels or goods had been stopped or pillaged or confiscated. During the last war between France and England the Dutch merchants made continual complaints of the violences committed on their vessels by English cruisers. The war just declared between the same powers has given birth to similar complaints on the part of the Dutch, the Swedes, the Danes and other merchants. It will therefore be proper to examine thoroughly these highly important controversies and to dis-

cuss generally the extent of the freedom of commerce, together with those limits which the belligerent parties pretend to put to it. The particular and very different opinions of learned men and even of statesmen cannot be allowed any weight. Their condition, their employment, their country, and even their prejudices have commonly a very visible influence on their principles, which they are accustomed to change according to the changes of conjunctures. Truth is immutable and eternal, and that alone shall be my guide in this discussion.

SECTION FIRST.

Difference between the Universal Law of Nations and the Particular European Law of Nations.

1. Neutral powers demand almost an entire freedom for the navigation and commerce of their subjects in time of war. The belligerent parties refuse to grant this, and assume a right to restrain them more strictly than in time of peace. Both sides appeal to the law of nations, and both persuade themselves that they find favourable decisions there. But as the term, law of nations, is sometimes construed in quite opposite senses, it will be necessary to fix an idea of it, and in this way to free it from the ambiguity, of which it is otherwise susceptible. For in reasoning only on vague and indeterminate notions, we rather confound the point in question than enlighten it, and never will succeed in deciding on it in a convincing and satisfactory manner. It is necessary therefore preliminarily to explain what the law of nations is.

2. That which is called right signifies sometimes an assemblage or body of laws of a certain kind; for instance, the civil law, or the canon law, sometimes power given by law to do or omit an action. Laws are rules to which we are obliged to conform our free or moral actions. If we come to a knowledge of these laws through our reason, and by the consideration of man's moral nature, they are called *natural laws*. The assemblage of these laws is the law of nature, in the first sense. When these natural laws give us the power to act in

a certain manner, or not to act, that power is called the right of nature, in the second signification. They therefore who refer themselves to the law of nature, give it to be understood by that, that their actions are conformable to natural laws, or that they have acted according to the power which those laws have given them.

3. Natural laws applied to the affairs of states or nations compose that which is called the law of nations. For nations, considered one with another, are moral persons living in natural liberty; and consequently they can recognise no other law than that of nature, when their contests or quarrels come to be decided. The law of nature applied to the affairs of nations bears the name of the universal law of nations, because its obligation is extended over all the people of the earth. It is immutable, being founded on natural laws which are immutable.

4. To the universal law of nations stands opposed the particular or European law of nations. The latter is not founded immediately on the law of nature, but on certain positive principles which the Christian people of Europe have adopted as rules for their conduct, one with another. Religion, which for a long time past has reduced them into a sort of society, reciprocal commerce and the communication of which it is the origin, the great number of affairs concerning war and peace occurring among them, and the negotiations and treaties which are their results—all these have insensibly established a great many of those rules, to which the tacit consent of nations has given a legal authority; and it is on this tacit consent that all the validity and obligatory force of the European law of nations depends.

5. Tacit consent is made manifest by the actions of men and people. It is necessary therefore that these actions be of a nature to show consent with certainty. Now we may rest assured, if the actions are often repeated in a uniform manner and in similar cases. From this frequent and uniform repetition springs what is called usage or custom. The Eu-

European law of nations then is an assemblage of certain usages and customs which the people and states of our part of the world have introduced among themselves.

6. The existence of this European law of nations is indubitable. There are very many usages and customs which the nations of Europe observe among themselves, both in peace and war, and it is thus that they are peculiarly distinguished from barbarians. European Christians treat their prisoners of war with great mildness; even a sort of liberty is left to them in their captivity. Thus the condition of these prisoners is sufficiently tolerable, and they always live in hopes of complete liberation by exchanges, by ransom, or by treaty of peace. The Turks and Tartars act quite differently, as well as the people of Asia and Africa, who make slaves of their prisoners of war, and what is worse, the American savages murder, roast and eat the wretches whom the fate of war throws into their hands. We may consequently imagine an Asiatic law of nations, or an African or American, quite different from that of the nations of Christian Europe.

7. As the European law of nations is founded only on positive principles, it is easy to comprehend that the nations, may, if they will, abrogate, change, or substitute new ones for them; which has been actually done as regards many ancient usages. Heretofore the sovereigns of Europe were in the practice of declaring war solemnly by a herald at arms, and with a certain formulary. This usage has ceased entirely. (a) At

(a) The elector of Treves, Philip Christopher de Seutern, having put himself under the protection of the French crown, and in order to be sheltered from an attack of the Swedes having received a French garrison into the town of Treves, the cardinal Infant Ferdinand, then governor of the Spanish low countries, caused the town to be surprised where both the elector and the French troops were made prisoners. After the cardinal Infant had refused to liberate the captive prince, Louis the 13th, king of France, according to ancient usage, sent a herald at arms to Brussels to declare war against the king of Spain. *Le Vasseur Hist. of the reign of Louis 13*, vol. 8, l. 38. p. 399. It has been remarked that this was the last time that formality was observed between the crowns of France and Spain. In 1657, Frederick the 3d, king of Denmark sent his declaration

present they content themselves with the exposition in manifestoes of the reasons for their recurrence to arms. Treaties of peace were formerly confirmed by the oaths of the contracting parties. That is the case no longer. (b) At present they spare themselves this idle ceremony: it is enough that sovereigns ratify what their plenipotentiaries have subscribed to. Indeed these oaths were a very frivolous formality; for the ancient treaties were not more religiously observed than the later ones made without this solemnity. It follows that nations and their sovereigns may change, and having sometimes actually changed principles and usages introduced among them, it thence appears that the European law of nations is mutable.

8. It is not upon written laws, but on customs only, that the European law of nations is founded. And as, according to general principles of jurisprudence, a custom is not supported by legal presumption, but must be proved by him who avers it, in case the opposite party does not agree to it; so whoever alleges the European law of nations in a particular case, must prove the existence of it, if in that case it is denied by the other side.

9. The validity and obligatory force of the European law of nations being founded on international consent, he who is to prove it ought to show that the nations and states of our part of the world have adopted the principles which he supports as true, have acted conformably to them, and without any contradiction whatsoever, in those cases which he alleges as proofs of the European law of nations.

of war against Sweden by a herald to Eric Steenbock, the Swedish governor in the province of Holland. Holberg Hist. of Denm. part 3. p. 241: which appears to be the last example that we have had in Europe of a solemn declaration of war by heralds.

(b) The kings of France and Spain, Louis 14th and Philip 4th confirmed with great solemnity and under oath, on the 6th June 1660, in the isle of Pheasants, the treaty of peace concluded between them the year before. Reboulet Hist. of the reign of Louis 14th, vol. 3. p. 225: since when I can find no instance of a treaty of peace sworn to by European princes.

10. It is not permitted therefore, in proof of this law, to exhibit cases or facts to which other nations have previously made opposition, either by protestation or in arms: for an essential quality would then be wanting, which is consent.

11. In all ages the nations of Europe have been seen engaged in quarrels and wars, which have been at last composed by transactions or terminated by treaties of peace. This then is the question: whether these kinds of public instruments are proper to prove the European law of nations. It seems at first that the decision should be in the negative. For these treaties being made between only the parties who were in conflict or at war, can oblige only those parties, and serve them for proofs of their rights or their pretensions: whereas towards others no obligation can spring from them, nor proofs of the European law of nations. If, however, princes or states in treaties concluded among themselves from time to time, have in such a manner adopted certain principles in regard to certain general affairs, as that the contrary is not found established in any of these instruments, their complete conformity will prove a general usage, and consequently the law of nations. Thus in all treaties of peace we find the liberation of prisoners stipulated on both sides: wherefore that is a point decided according to the European law of nations.

12. But there are treaties in which quite different principles are established on the same affair. If then these principles are altogether contradictory to one another, the law of nations becomes doubtful and uncertain. But, as in the ordinary concerns of life and business that is taken for a regulation which is oftenest done and commonly, and that which happens but seldom, and against the general usage, as an exception, the principle which is established in the greater number of treaties, should be regarded as a rule, and that in the fewest as an exception. It is therefore, according to the principle contained in the greatest number of treaties that the dispute should be decided, and especially if the greater

number be of recent date and the fewer more distant. For, from this circumstance it may be inferred that people have by degrees abandoned an old principle, for the adoption of a new one, and that by this change of principles they have in like manner changed the law of nations.

13. If he who refers himself to the European law of nations, is not able to prove its existence in the point contested, or if it has become doubtful and uncertain from the contradictory manner in which people have thought and acted in such cases, recourse must be had to the universal law of nations. For the law of particular nations, either making no provision for the case in question, or being doubtful and uncertain, cannot afford sufficient reasons for a decision. Nothing remains then but to follow the universal law of nations, and its universally acknowledged principles, and this would likewise take place in a dispute wherein one of the parties should found himself on the ancient law of European nations, the other on the new, and they disagree as to which shall have the preference.

14. Having thus settled the vague and indeterminate notions, concerning the universal law of nations and that of Europe, I shall now make some observations on neutrality, the freedom of the seas, and commerce in general; in order that when we reach the main object of this essay, I may proceed with the greater ease, and found my reasons on principles the more solid and unquestionable.

SECTION SECOND.

Of Neutrality and Assistance.

15. We call neutral a sovereign or state, one which in case of a war breaking out, takes no part in it, and keeps up friendship and a good understanding with both the belligerent parties, in perfect impartiality; which relation towards those two parties is neutrality. Now such a sovereign continuing to be the friend of both the belligerents, they are bound to observe a similar conduct towards him.

16. The territory of a neutral state is consequently inviolable to the belligerents, who cannot and ought not to exercise the least act of hostility there. Its inhabitants and subjects are of course exempt from all sorts of contributions, deliveries, exactions and violences by the armed enemies or their detachments; but enjoy on the contrary, complete security in their persons and effects. In a word; as the neutral prince does not meddle with the war, no part of what the right of war authorizes against an enemy, is permitted against either him or his subjects. He preserves therefore all the rights which he had before the war, nor can the belligerent powers in any manner impose on him new obligations, to which he was not subjected towards them before, and in time of peace.

17. But belligerents always strive to involve, if possible, the whole world in their quarrel. They make use of every effort to obtain the aid of other powers, and to persuade them to make common cause against their adversaries. If a state complies, if it enters into alliances, and lends in effect succours to one of the parties at war, it declares itself the enemy of the other, and then its neutrality ceases. In this change of affairs it should naturally expect that the party against which it has declared, will treat it as an enemy and make it feel all the evils consequent on wars. And as a sovereign and his subjects are morally considered as the same person, the latter will have to suffer all the inconveniences and violences which war permits without a right to complain of them as unjust.

18. The universal law of nations authorizes all this. But Christian Europe, in modern times, has considerably softened its rigor. Treaties of alliance and subsidy have often been known to be contracted with one belligerent party, by virtue of which that party has been assisted with auxiliary troops, either taken into pay, or gratuitously, without producing a rupture with the other party. The States General of the United Low Countries in this manner supplied Denmark, in her war against Sweden in 1658-9, with almost all their naval

forces and great part of their troops notwithstanding which no war between them and Sweden was the consequence. In 1663-5 France and England supported Portugal with their troops against Spain, and the latter did not go to war with them for it. In the war which began in 1688 and that of the Spanish succession, the kings of Denmark, Christian V. and Frederick IV. placed considerable bodies of their troops at the disposition of England and the States General of the United Low Countries, who employed them against France: yet peace subsisted between the latter and Denmark who was always regarded as neuter. These examples, and many more which might be cited, sufficiently prove that belligerents against whom neutrals have permitted the employment of their troops, have submitted to this without taking vengeance for it. But the true motive of such conduct is not to be sought but in their policy. Sometimes it was difficult to attack the assistant, and at others fear dissuaded them from adding to their enemies. A lesser evil therefore was borne in order to avoid a greater. The European law of nations has never recognised this kind of assistance by a neutral as consonant with neutrality. For there are cases in which such succours have been treated as hostile attacks. It was thus that Louis XIV. regarded the succours given by the emperor and elector of Brandenburg to the United Provinces in 1672. And when the latter in the Austrian succession war gave aid to the heiress of Charles VI. by an army against France, and nevertheless pretended to be neutral, Louis XV. did not respect this neutrality, and attacked the States General as enemies in 1747. That war as well as that which began in 1756 between the house of Austria and the king of Prussia furnish other examples, which show that European nations and states have thought very differently on this point. The European law of nations is therefore, in this respect, problematical and uncertain; and of consequence no decision can be formed on it.

19. This then is the place to discuss the question, in what light ought those pecuniary subsidies be considered which a neutral

pays to a belligerent in order to support it, as has been done for a long time in Europe. Can these subsidies be reconciled with neutrality? In the last war between Russia and Sweden the latter received extraordinary subsidies from France, and in the beginning of the Austrian succession war, Great Britain and the United Provinces, at a time when they pretended to be still neutral, paid very considerable sums, under the name of subsidies, to the queen of Hungary and Bohemia. According to all that has come to light, the belligerents, or the other side, against whom these subsidies are paid, made no complaints of them, and consequently did not regard this kind of succour as an infringement of neutrality. The affair then agreeably to the European law of nations is to be considered as decided, more especially as in the commercial treaties of Europe money is not accounted contraband. [See hereafter § 108. 5.]

SECTION THIRD.

Of the Freedom and Empire of the Sea.

20. Several authors have written so much of the freedom and empire of the sea, that to undertake to examine their particular opinions on the subject, with the strange decisions they have made, would be to enter into a labyrinth from which there is no escape. We will not stop at their disputes; it will be enough for us to point out with as much precision as possible what may with justice and truth be affirmed in regard to the pretended empire of the sea and its freedom.

21. The streams, lakes, and all the waters of a country are parts of it and the property of the state, subject to its sovereignty. It is the same thing as respects the gulfs which enter into a country, provided that the shores on both sides belong to it. Hence it is that Sweden has dominion over the gulf of Bothnia, and the United Provinces over the Zuyder zee, which is nearly encompassed by those provinces. Both these powers have therefore a right to exclude foreigners from the use of these waters, and to interdict their navigating or fishing there. And as the ancient Romans were in possession of all

the shores of the Mediterranean sea, and of all the islands there situated, that sea was in fact but a gulf in the midst of the Roman empire. It was therefore with reason that the Romans took to themselves the empire of it, which ought to end however with their loss of the provinces that environed it. The dominion of straits is founded on the same principle with that of gulfs, in case the same state owns both shores. Hence it is that the crown of Denmark, which was formerly in possession of Scania, acquired the dominion of the sound, that is to say, of the strait between Zealand and Scania.

22. There is then no doubt that the possession of both shores of gulfs and straits carries the dominion of them with it. But for the same reason the high seas and the ocean acknowledge no empire whatever, and by their very nature are incapable of it. Only the nations of Europe by general consent having granted to each other so much of their states as is contiguous to the sea, are masters of the shore which surrounds it as far as they can defend what they own from the shore. This ownership extends a cannon-shot; and this is the reason why foreign vessels, when approaching ports or fortresses on the coast, are obliged to salute them with a certain number of discharges of cannon, and to render them due honours by lowering their flag and sails. Hence it is also that forts and fortresses never permit either attacks or acts of hostility under their cannon, but force the aggressor to desist from them.

23. In fact it is no further than this, that the rights of those powers extend who appropriate to themselves the empire of any part of the sea; namely, the Venetians over the Adriatic, (a)

(a) *Dominio del Mar Adriatico della Serenissima Republica di Venetia*, descritto da Fr. Paolo Sarpi, and another work by the same author, *Dominio del Mar Adriatico e sue Raggioni per il Ius belli della Serenissima Republica di Venetia*. These two works are found in the sixth volume of the *Opere del Padre Paolo Sarpi dell' Ordine de Servi et Theologo della Serenissima Republica di Venetia*. (In Venetia, 1687, 6 volumi, 12.)

the Genoese over the Ligurian sea, (b) and Great Britain over the British channel. (c) In the latter the English require from all foreign vessels the lowering of the flag and sails of the main-top-gallantmast to the king's ships, as an acknowledgment of their empire over the British channel; and they have compelled the states of the United Provinces to this by several treaties made with them in 1654, 1662, 1667 and 1674. In the latter they fix the limits within which they require this honour. Those of the south-west are cape Finisterre in Galicia, those of the north-east the centre of the country of Staten (the promontory of Stat) in Norway. (d) This is a very ample extension of the boundaries of the British channel, which however other nations do not subscribe to. The famous Selden concludes his work on the Empire of the Sea with this bold determination, that the very coasts and harbours of the neighbouring states situate beyond the sea are the limits of the maritime empire of the English on the south and east. But later and more equitable English authors have abandoned these superannuated and extravagant notions. In the disputes which arose in 1636 between king Charles I. and the Dutch concerning the herring fishery in the British channel, the latter denied the pretended empire of the English, which they said could not take effect but in the bays and gulfs and on the shores. The famous philosopher and historian David Hume agrees with them. 'It must be confessed,' says he, 'that the laws of nations do not warrant a more extended claim.' (e) And if at present the English empire of the seas is spoken of, nothing is meant by that ex-

(b) Petri Baptistæ Burgi de Dominio Serenissimæ Genuensis Reipublicæ in Marii Ligustico, libri 2, Romæ 1641. 4.

(c) Johannis Seldeni Mare Clausum, seu de Dominio Maris, libri duo. Londini, 1636. 8.

(d) Treaty of peace between Charles II., king of England, and the United Provinces of the Low Countries, of the 19th of February, 1674, art. 4, in the Corps Diplomatique de Mons. Dumont, tom. vii. p. i. p. 253.

(e) Hume's History of Great Britain, vol. i. p. 213.

pression but their great maritime forces, which have enabled them till now to give law to the whole ocean.

24. The most zealous defenders of the empire of the seas agree however with the supporters of their freedom, in this principle, that the use of the ocean and of the high seas is common and allowed to all nations for navigation. The end of navigation is commerce or war. All people have then a right to send their vessels to sea on enterprises of either war or commerce. This right is perfectly equal in regard to all, and it would be manifest injustice on the part of any one to endeavour to deprive another of the use of it. Yet this is often done, it may be easily imagined on which side.

SECTION FOURTH.

Of the Freedom of Commerce in General, and of its Foundation.

25. Commerce has established among the inhabitants of our globe, and even among people the most remote and separated from each other by great oceans, a communication and a sort of universal society, which is advantageous to them, to the whole in general, and to each of them in particular. It is commerce which furnishes them the means of providing themselves with the commodities they do not possess, and to free themselves from the superfluities for which they have no occasion. Buyers and sellers find their profit in it. This reciprocal profit is the principal motive that animates all nations, as well those we call barbarous as the polished, with so strong and great an inclination for commerce. To extend and make it flourish is at present the ruling passion of all the European states and of their sovereigns.

26. Commerce comprehends all the products of nature and art, and all sorts of merchandise which the purchaser desires, because he finds his account in it, and which the seller is desirous to get rid of from the same motive. Love of gain is the cause and preservation of commerce. Thus all goods from

which merchants hope to derive some profit, are objects of commerce,

27. It is however an affair of the policy of each state and of its government to judge whether the commerce of its subjects with foreigners is advantageous to it or prejudicial. It depends therefore upon it alone to permit or prohibit it, or at least restrain the traffic, as well by the laws of the country as by treaties with foreign powers, in the manner deemed most conformable with its interests and with prudence. It may consequently, according to the diversity of circumstances, interdict the entry and clearance of certain merchandises; it may authorize trade with certain nations, under easier conditions, and under more burthensome ones with others, as is the case with the English and French, whose goods are charged in both kingdoms with greater imposts than those of other nations.

28. Hence it is easy to see that the freedom of commerce depends entirely on the good will and consent of the states whose subjects carry it on with each other, and the laws imposed by sovereigns on their trading subjects are the only rules they are bound to observe. This being presupposed, they have an unquestionable right to traffic with one another, and to interchange at all times all sorts of commodities in the sale of which they find their account. Peace or war on the part of a third makes no difference in it,

SECTION V.

Of the Freedom of the Navigation and Commerce of Neutrals in time of war, according to the Universal Law of Nations.

29. The first law of nature enjoins it on us to hurt no one, or what comes to the same thing, not to do any thing that may hurt another, his property or rights. From this law applied to nations there emanates this constitution of the universal law of nations: Each state and people is bound not to injure another, nor to molest them in the enjoyment of their rights and property. Now, people having, by permission of the

sovereign authority, an incontestible right to trade with one another [28.] it follows that a third state cannot in any way intermeddle with the commerce of the subjects of another, with which it is at peace, nor restrict them in the exercise of it.

30. The inhabitants of a neutral state therefore have a right to carry on trade with all people in time of war just as they did in time of peace. Of course they may continue it on its ordinary footing with the belligerents, without either of them being at liberty to interdict or prevent it.

31. The freedom of the commerce of neutrals in time of war being unlimited, they are permitted to trade in all kinds of merchandise, as well in time of war as in peace. Either of the belligerents should therefore allow the merchants of a neutral country to sell to the other all kinds of merchandise which could have been sold before the war.

32. As it is lawful to traffic in time of peace in merchandise of all kinds, inasmuch as laws and treaties except none [27.] and consequently to sell arms and munitions of war to other people, the subjects of a neutral sovereign have a right to do the same during war, because belligerents have no right to impose on neutrals new obligations, unusual in time of peace: to which may be added another consideration. Great part of the trade of certain European people, like that of the Swedes, the Norwegians and the Russians, consists in goods necessary for war, and for the construction and equipment of vessels. They sell not only iron, copper, masts, and other wood for carpenters, pitch and tar, &c. but likewise cannons, and even vessels of war complete. Would it not be doing them a great injustice to deprive them of the principal branch of their commerce, and even of their subsistence, by reason of a war in which they have no interest whatever? The injustice of it is palpable, and flashes in every body's eyes.

33. The universal law of nations draws no distinction between goods which may be the objects of commerce in peace or in war. [31.] Thus neutral merchants who supply the bel-

ligerent parties, or either of them, with arms and other war-like munitions, do but exercise their rights, and of course do injury to no one whatsoever.

34. Commercial people know no other law than what they receive from their own sovereign. [28.] In case then that the latter take no part in a war, remaining neutral, the belligerents acquire no greater rights respecting them than they had in time of peace. [16.] Consequently it is not in their power to impose any orders on the merchants, subjects of neutral states, respecting the goods which may be the objects of their commerce: and one of the belligerent parties cannot by his proper authority except from it any sort with which the neutral merchant is not to furnish the other party. Still less can all their commerce be interdicted entirely by the belligerent with the country and subjects of his adversary.

35. This is true in general without doubt. But the consequences and accidents of war may sometimes make an exception, and give a belligerent the right to limit in some manner the commerce of neutral nations, at least for a certain time and in a certain place. Let us then search for a general principle in order to elucidate this right and ascertain its limits.

36. The power of ordering any thing and of punishing transgressions of the ordinance presupposes the right to give law and enforce it. Hence this rule may be deduced: In all places where a belligerent has legislative and executive power, it may prescribe to neutral merchants what goods they must not carry in there or bring out. It may also punish contraventions by confiscation of the prohibited goods, and consequently place limits to neutral trade.

37. A belligerent state or sovereign has without contradiction the right of attacking its enemy's country, and taking possession of it. Throughout, therefore, the whole extent of the places, and the time in which it has possession, it may be indubitably regarded as temporary sovereign of the countries it has occupied: for with the possession it acquires all the rights of sovereignty. It may then give laws there, and of

consequence limit the trade which neutral merchants carry on in countries subjected to its arms, or which they might carry on there with the enemy; it may indeed, if it will, interdict their trade altogether, and punish those contravening this regulation, by confiscation of their goods and cargoes.

38. In like manner as a belligerent, having conquered his enemy's country, becomes sovereign of that country, either wholly or in part, should he also be in a territory which his troops have occupied, being stationed there for the siege or blockade of a fortress. This temporary sovereignty gives him a right to forbid foreigners all commerce and all communication with the place besieged or blockaded, and to prevent both by sea and land the conveyance of all commodities and merchandise by which the capture of the place might be retarded or rendered difficult.

39. These are the only cases when a belligerent has a right to interdict neutral merchants from commerce as well in general as in particular merchandise. Moreover as this right is restricted to a country conquered from the enemy, and to the time during which it is held possession of, which gives the belligerent but a temporary sovereignty, he has no where else nor otherwise any legitimate power to forbid neutral merchants trading in any merchandise whatsoever, nor to prevent their following it. He cannot arrogate this right in any place where his authority is not recognised, and still less on the high seas.

40. But navigation and maritime commerce are principally what has given rise to quarrels between neutral and belligerent states. For the latter lay claim to stopping merchant ships on the high seas, visiting and searching them, to ascertain whether they are laden with arms and munitions of war destined for an enemy, in which case they seize vessel and cargo. This then is the question: whether the universal law of nations gives the belligerents so extraordinary and exorbitant a power?

41. It has already been remarked [24.] that navigation on the high seas is common and permitted to all people for commerce and war, and that they have equal rights for the one as well as the other. It is therefore certainly lawful for belligerents to pursue their enemies by sea, and to do them as much damage there as possible. One party may of consequence seize the vessels and goods belonging to another or to its subjects and appropriate them as good prize.

42. That party has also the same right against the allies and assistants of its adversaries and their subjects: for by this assistance they take part in the war, thus becoming enemies of the other party, which has a right to treat them as enemies.

43. But it would be confounding extremely the notions of things to endeavour to support an almost equal right of belligerents towards neutral states, their subjects and vessels. For the latter taking no part in the war, cannot be considered as enemies. The right of war cannot then give any power to belligerents to stop on the high seas the vessels of neutral nations, nor to visit nor take possession of them.

44. But it will be said that belligerents do not lay claim to this general right, but merely when the neutral vessels are laden with contraband merchandise. For it is the practice, at the beginning of a war, to publish ordinances wherein they apprise neutral merchants trading by sea, of the conditions on which commerce with the adverse party ought to be permitted. Arms, munitions of war and goods belonging to the enemy or his subjects are commonly excepted from that commerce, all those effects being declared prohibited and confiscable. It is then, say they, the fault of the neutral merchants, if by their transgression of such an interdict, they put themselves in danger of having their goods seized and condemned. The question is therefore to ascertain, if belligerents have a right to publish such ordinances, and if foreign merchants, the subjects of neutral states, are bound to observe them. The answer cannot but be in the negative; for such an obligation cannot naturally have effect, if the belligerent's right to im-

pose it be destitute of foundation; and that it is destitute of it is easy to be shown. The conditions which belligerents would prescribe to neutral merchants, according to which the latter are to conduct their commerce during war, are properly laws, and nominally penal laws, because they menace transgressors with confiscation of their goods and even their vessels. Now it is an essential quality for a legislature to have sovereign power over the persons to whom he gives laws, or over the place of their enforcement, or at least that where the transgressor is taken. Belligerents have neither. For the persons are foreign merchants, who do not acknowledge them as their sovereigns, nor is the place where the ordinances are to be enforced, or where the transgressors are to be found under their dominion. The place is the sea, which for the purposes of navigation is open and common to all people [24.] and where the law of war can have no effect but against the enemy, or his subjects and allies. To publish such ordinances is therefore arrogating sovereignty over persons and places, where none exists, and prescribing laws to those who are not bound to obey them. No belligerent party has then any right to interdict neutral nations from commerce with its adversary, either altogether, or in certain goods, nor that of declaring them confiscable; which cannot absolutely take place especially when the neutral merchants, as has been shown already [31,32.] have full liberty to traffic in all sorts of goods, even munitions of war, as well in time of war as in peace.

45. If a belligerent party wishes to prevent this, the only and the most convenient means for that purpose will be negotiation, engaging the sovereign of the merchants to forbid their carrying arms and other merchandise necessary or useful for war to the other party. This mode agrees better than any other with the rights and honour of neutral states, and was that adopted by the Genoese when they were at war sometime ago with the rebels in Corsica. They addressed themselves to several of the European powers in order to obtain a prohibition by virtue of which their subjects were not to supply the

Corsicans with arms nor munitions of war. The British court also did so at the commencement of the rebellion of the Americans. It required from the States General of the Low Countries an interdict against any of their subjects carrying any munitions of war to the rebels, which was likewise consented to.

46. Nevertheless consent to such a demand is not a duty but a pure complaisance on the part of the neutral powers. It depends on their disposition to consent or refuse. In case of its being consented to it becomes necessary to consider if the belligerents may likewise be judges in their own cause, and punish contraventions by seizure and confiscation of the prohibited goods. If not, the belligerents' power would not extend beyond stopping them and denouncing the owners to their sovereign, in order that he might punish them.

47. Belligerents no doubt have a right to seize enemy's vessels and their goods laden on board of them, both being good prize. It remains to be determined whether they have a right to seize enemy's goods on board neutral vessels. It may happen in many ways that goods belonging to the enemy should be transported in neutral vessels, either because belligerent merchants, purchase goods in a foreign country, and send them home in neutral bottoms, or because their goods are laden there to be sent to foreign countries, or finally because neutral merchants take the goods on commission, and lade them on board their vessels, at the owners' risk. All this is permitted and usual among commercial nations. Now neutral merchants having a right to trade in time of war in the same manner they did in time of peace [30.] may certainly in so doing follow the customs prevailing among merchants. Hence results the liberty to carry in their vessels as well to enemy merchants the goods bought by the latter in a foreign country, as to transport those which they send thither to the place of their destination, and also to lade on board their ships those which enemy merchants have given them on commission.

48. It is true that belligerents have a right to seize enemy's goods. But on board a neutral vessel on the high seas they

are in a place where this right ceases. For the vessels of neutral nations are as much part of the property of the state as the towns, villages and houses which are situated there. Now it not being permitted to belligerents to commit violence in a neutral territory, [16.] neither should they seize goods laden on board a neutral vessel, under pretext that they belong to the enemy or his subjects and that the risk is on their account. For the vessel being free, so in like manner should the vessel be; or, as is commonly said, free ships make free goods. The sovereign of the owner of such a neutral vessel has therefore a right to demand satisfaction of the sovereign of the privateer or vessel of war for violence done to him, and the insult offered to his flag.

49. If then none of the effects belonging to the enemy or to his subjects should be taken from on board a neutral vessel, the consequence of it is that the vessels of war and privateers of belligerents cannot and ought not in any manner exact from neutral vessels going to or returning from enemy's ports, a verification or proof that the cargo is the property of neutral merchants, and not of enemy's subjects, and that the latter have not given them goods on commission, and assumed the risk upon themselves; for the right of seizure and confiscation ceasing, it would be vain and useless to institute researches into the property, or to prove it. Such a proceeding is moreover contrary to the common and known rules of jurisprudence; according to which it is to be presumed that effects found in a vessel, like those in a house, belong to the owner or occupier. Thus the proof does not lie upon him, (the legal presumption being in his favour) but on him who asserts that the effects found in the vessel or the house are the property of another person. It is consequently manifest injustice to impose the proof on the master of a neutral vessel that his cargo is the property of neutral merchants and not of enemy subjects. The cruiser whose avidity has induced him to take the vessel, and who asserts the contrary, is rather obliged to prove it, even supposing, but without acknowledging, that the goods laden on board the vessel are liable to seizure and confiscation.

50. Another question is to be discussed here: whether the belligerent, whose ships of war or cruisers have taken an enemy merchant vessel, has a right to seize and confiscate the goods of a neutral merchant which happen to be on board, as well as those of the enemy. It has been before shown that neutral nations enjoy liberty to trade in time of war the same as in time of peace, [30.] and consequently that according to the constant practice of merchants they may ship their goods in foreign vessels. By this they lose nothing of their ownership. But as it is a legal presumption that whatever is found on board of a vessel belongs to her owner, the whole cargo of a ship taken from the enemy is justly deemed his property. If then a neutral merchant alleges that the goods found on board an enemy's vessel are wholly or partly his, for which reason he lays claim to them, it lies on him to prove his property, the legal presumption being against him. But as soon as he has established it judicially his goods ought to be restored to him.

51. As it is lawful for neutrals to trade with belligerents, and to carry them all kinds of merchandise, even arms and warlike munitions not excepted, and as neither of the belligerents has any right to take goods belonging to their enemies from on board neutral vessels [47,48.] it matters not for them to ascertain what the neutral cargo consists of, nor to whom it belongs. Ships of war and cruisers of belligerents have therefore neither reason nor power to require neutral vessels navigating the high seas to exhibit their *bills of lading* and other papers concerning the cargo, and still less can they search the goods.

52. All that ships of war and cruisers have any occasion to learn from neutral vessels they may meet, comes to this: whether the vessel be enemy or neutral? for which purpose neither an exhibition of the papers concerning the cargo, nor search of the goods is necessary. The passports alone and the sea-letters suffice: and all the cruisers can require is to see them, which cannot be denied. For having a right to

seize enemy's vessels, which often conceal themselves under a foreign flag, it is necessary to allow the cruisers power to exact of the vessels alleging themselves neutral, the exhibition of their passports and sea-letters, in order to ascertain whether they are really so.

53. These are the limits which the natural and universal law of nations fixes for belligerents as regards their proceeding towards neutral nations. But far from stopping there, ships of war and cruisers do not content themselves with examining the *bills of lading*, but search every thing on board the vessel. They conduct the neutral into a port of their own sovereign, in order that sentence may there be passed on the validity of the prize. This then is a new sort of jurisdiction. Let us see on what foundation it is established.

54. The right of a state to establish courts of justice is founded on its legislative power; this being the source of the sovereign jurisdiction, the exercise of which requires the institution of courts. Neither of the belligerents has a right to give laws to neutral merchants, as has been shown before, [34.] the ordinances they publish at the beginning of the war not being to be at all regarded as such. [44.] Thus the belligerents having no legislative power over neutral nations, have, of course, no jurisdiction over them. Their courts therefore cannot pronounce judgment on either neutral vessels or cargoes.

55. Nor can they declare them good prize, or confiscate them, under pretext that their cargo consisted of contraband goods, or was enemy's property. Confiscation is properly a punishment. But as according to the universally recognised principles of jurisprudence no prince has a right to punish foreigners, unless they have committed misdemeanours in his dominions, and have been arrested there, his courts cannot in a case like that now in question condemn neutral merchants to any penalty: for they have neither been guilty of a misdemeanour in his territories, nor been arrested there. The proceeding of the belligerents is therefore entirely opposed to the

common notions of jurisdiction, if by the sentence of their courts the vessels and goods of neutral merchants are pronounced good prize and liable to confiscation.

56. The establishment of these tribunals being unjust, all that follows from their sentences must be so too; and the whole amount of loss which the foreign and neutral merchants have thus sustained, is a charge upon the state establishing them.

57. As a jurisdiction established over the subjects of a foreign prince is by no means compatible with the independence of free and sovereign states, such a prince may justly demand a suitable satisfaction for his violated rights, and an indemnity for the wrongs and losses which such a jurisdiction has caused his subjects. His demand is not to be eluded by an allegation that the cause of his complaining subjects should be adjudicated in the courts of the country and according to its laws, and that they have an opportunity of appealing from those courts, in case of grievance, to the superior courts. This proceeding takes place only in the ordinary trials of individuals, but not at all in affairs where states have contests with each other: for one party not recognising the municipal laws of the other, these disputes can be terminated according to the universal law of nations alone, and by negotiations between the respective governments. (a)

58. But what is to be done in case the sovereign of whom reparation is demanded for the wrong and damages, refers himself to the constitution of his own state, which does not punish his transgressing the laws of the country, and will not give orders for the release of a vessel seized and detained?

(a) All this will be illustrated hereafter [194, 197.] by the disputes which arose in the war of the Austrian succession between Great Britain and Prussia, concerning the Prussian merchant vessels stopped and detained by British cruisers. Publications have appeared on each side in defence of their respective pretensions. See *Observations on the Law of Nature and Nations, concerning the capture and detention of neutral vessels and effects during war, extracted from the writings of Frederic Behmen. 1771. 4.*

This excuse can be of no avail in the affair in question. The constitution of a state, and the impotency thereon founded to do or order nothing contrary to the laws of the country, in no way concern another state, or a prince who insists upon a just satisfaction for injuries done to him or his subjects. For the sovereign of such a state having given commissions to the captains of his vessels of war and privateers, is thereby obliged to answer for all the evil and illegality which they have committed by virtue of those commissions. He cannot elude the just demands of another state, under pretext of the form of government tying his hands; and that state has a direct recourse to him.

59. Thus every thing considered, the courts established by belligerent powers over merchants, subjects of neutral princes, their vessels and effects, are sustained on a foundation so slippery, and which affords them so little support, that it is not difficult to overthrow them, with all their unjust proceedings, incompatible with the freedom of commerce.

60. But as to the arguments which I have hitherto advanced to prove the unlimited freedom of the commerce of neutral nations, it must not be forgotten that the subject is here treated merely according to the natural and universal law of nations. For that of Europe has made great changes in it, and introduced principles altogether contrary, as I shall show in the sequel. At present I shall endeavour to resolve some doubts which are commonly opposed to the freedom of the commerce and navigation of neutrals in time of war.

61. Even those authors who have treated of the law of nature and nations in their works, have adopted principles, or rather opinions, which extend the rights of belligerents too far, by allowing them all against all, (*tout contre tous*). These opinions often weigh as much as the truth with the greater part of readers, inasmuch as they proceed from celebrated men. I consider myself, therefore, bound to show their fallacy the more, as they are objections against that which I

have deduced for the freedom of the commerce of neutrals in time of war. In the first place they oppose this reasoning: "War," they say, "changes the face of things, and consequently the rights and obligations of people. That which was indifferent to them and innocent in time of peace, is no longer so in time of war and as regards belligerents. The latter then acquire the right which they had not before to place such bounds to the freedom of the commerce of neutral nations as that it shall not become prejudicial to them." The first assertion, that war changes the rights and obligations of people is not universally true, but merely as respects those who make war on one another. For this state gives them the right to do each other as much harm as they can, but not those who take no part in the war. The latter preserve all their rights as well in war as in peace, and belligerents cannot absolutely impose on them any new or unaccustomed regulations. [16.] Hence appears also the fallacy of the second assertion, to wit, that belligerents acquire the right to place bounds to the freedom of the commerce of neutrals, in order that it may not prejudice the belligerents. For as respects navigation and commerce, the rights of war cannot be extended further, than over the belligerents' own subjects, and not at all over neutral states and people, even though their navigation and commerce be injurious to one or the other of those making war on each other. In all the undertakings of a man, and even in those of a state, which may be attended with hurtful consequences to a third party, the whole is reduced to this question: whether the man or the state has a right to make the undertakings which he does. That taken for granted, he does wrong to no one; and even though a third might suffer, that is nothing to him. Neutrals who trade by sea, do but use their right, and that in a free place, which is the high seas, where neutrals and belligerents have rights perfectly equal, one for commerce, the other for war. It follows that the one must not disturb the other in the exercise of his rights, and therefore that belligerents must not in any way restrain the

navigation and commerce of neutrals. [24.] The question is not to be considered here, whether this commerce is prejudicial to one or other of the belligerents. It very often happens that certain undertakings of one state become prejudicial to another. In Spain, for instance, several fabrics have been latterly established, and manufactures in wool and silk, which occasion considerable losses to the French, the English, and other nations, because they cannot dispose of as many of their goods as heretofore in that kingdom. But who would say that those nations have a right to forbid the Spaniards the establishment of those new fabrics and manufactures. For the latter do wrong to no one in this exercise of their right. The establishment of East India companies in Denmark and Sweden has become very prejudicial to that of Holland, because the latter by this loses a great deal of its exports and of its large profit. Nevertheless the States-General of the Low Countries could not complain to the Danes and the Swedes, they not having done what was unjust. By the same reason belligerents cannot interdict to neutrals either commerce in general, or in any particular articles of merchandise.

62. Another objection urged in favour of belligerents, and their rights, is this: "We have a right to defend ourselves against an enemy, and consequently to enfeeble him as much as possible, by depriving him of the means of our annoyance. Now, neutral merchants, who supply him with arms and munitions of war, increase his force, and thus facilitate his means for our annoyance. They interpose therefore an obstacle to our defence. But this right being unlimited and boundless, gives us the power to prevent such commerce with our enemy." It is easy to perceive here an illegitimate deduction from vague and indeterminate premises. For this pretended right of infinite defence, can only be infinite against the enemy and his allies, but not at all against the subjects of neutral states, nor their commerce, which depends not on the good will of the respective sovereigns of the merchants who carry it on, and by no means on the good will of a

third party. [28.] Whether this commerce is injurious to either of the belligerents, this is not the place to inquire, for reasons before given. [51.]

63. Finally, it is attempted to sustain the cause of belligerents against neutral merchants by this argument: "He who aids our enemy is our enemy. Now they aid our enemy by furnishing him arms and munitions of war. They are therefore the same as our enemies, and we have a right to treat them as such, by taking from them the goods which they are carrying to our enemies." But all this can avail only against a state or sovereign, who succours a belligerent, by supplying him with troops, horses, arms, or other munitions of war: for thus the neutral declares openly his intention to assist him by preference. He abandons then neutrality, and becomes the enemy of the other party. The latter likewise treats him like an enemy, justly exercising against him all preventions permitted by the law of war. The case is quite different with merchants, who have no design to assist either of the belligerents by preference. Gain is the only motive of their enterprises, and they seek for it wherever they hope to find it. It is therefore very natural that for their adventures they should select those kinds of merchandise, from which the best profits may be expected. These depend on the wants of purchasers, and the scarcity of certain commodities in foreign countries. Time and conjunctures sometimes cause this scarcity, and it is for the merchants to avail themselves of it. And as arms and munitions of war are very much sought after in the belligerent states, which enhances their price, merchants carry them thither from the same motives which induce their sending grain to countries where bad harvests or other accidents afford high prices. It is constantly taken for granted here, that those merchants are subjects of neutral states, wherefore it is, that the belligerents have no right to treat them as enemies, to interrupt their trade, to take or confiscate their goods, although they consist of munitions of war. For as to these

neutrals, they are at liberty to trade with all the world, as well in war as peace, and in all kinds of merchandise. [31, 32.] There is a great difference between them and declared enemies. The violence which is lawful against the latter cannot take place towards them. However policy may prompt belligerents to prevent a commerce which is prejudicial to them, or may become so, it nevertheless affords them other means more consonant with justice and the rights of third parties, of which they may avail themselves, without recurring to extremes which are unjustifiable except against enemies. The most proper of these means is that of prevailing on the sovereign to forbid his merchant subjects from trading in the munitions of war, while it lasts. [45.] At any rate the belligerents may buy the goods which the neutral would carry to the enemy: and that would be the last demand that can be made on him. For they do not give their merchandise gratuitously, but sell it. The belligerent then, desirous of having it, and of depriving his adversary of it, should content himself with its transfer to him on the same terms on which the other could have acquired it. Thus he would attain his object without trenching upon the rights of another, or offending him.

64. I believe that I have now sufficiently established the rights, which, agreeably to the constant and immutable principles of the universal law of nations, are adapted to neutral nations in what regards their navigation and commerce in time of war. In order to afford a view of them in one glance, I will here exhibit an outline of them.

1st. A state cannot hinder the trade that the subjects of another with which it is at peace, carries on with a third. [29.]

2nd. It is lawful for the subjects of a neutral state to trade with all people, as well in time of war as in time of peace, and consequently with belligerents, in all kinds of merchandise. [21.]

3d. This comprehends arms and munitions of war. [30, 32.]

4th. Belligerents have no sort of right to prescribe laws to neutral merchants with respect to their merchandise, nor to except any certain kinds. Much less can a belligerent entirely interdict navigation and trade to another's country... [34.]

5th. In case, however, of a belligerent's having by force of arms conquered a province from its enemy; the belligerent may there assign limits to the trade of neutral merchants, and even, if so disposed, interdict it altogether. [37.]

6th. In like manner, a belligerent may prevent it by force with all places blockaded, invested, or besieged by his troops.

7th. Excepting this case belligerents should not anywhere molest neutral commerce, and least of all on the high seas. [39.]

8th. Belligerents may however pursue and attack their enemies, and their allies there. [41,42.]

9th. But they have no right at all to stop, search and seize the ships and goods of neutral nations there. [43.]

10th. Neutral merchants are not bound to obey ordinances published by belligerents at the beginning of war, by which they undertake to limit commerce with their enemies' countries, or to interdict certain sorts of merchandise. [44.]

11th. Such an interdict cannot be imposed on merchants but by their own sovereigns, and it is from them that the belligerents should obtain such injunctions, through the medium of negotiation. [44.]

12th. But it depends on their pleasure whether to grant them. [46.]

13th. Belligerents have no right to take from on board of neutral ships effects belonging to enemies or their subjects. [47-8.]

14th. It is manifest injustice to put the master of a neutral vessel to prove that the cargo belongs to neutral merchants, and not to enemies' subjects. [49.]

15th. If the goods of a neutral merchant be found on board an enemy's merchant vessel, they should be restored as soon as found to be his property. [50.]

16th. Vessels of war and privateers of belligerents have no right to require from neutral merchant vessels exhibitions of their bills of lading or other papers relating to the cargo, and still less have they any right to search their cargoes.

17th. All that they can exact amounts to an exhibition of the passports or sea-letters, in order to inform themselves whether it is actually a neutral vessel or not. [52.]

18th. Belligerents have no jurisdiction over neutral merchants nor over their vessels sailing on the high seas. They cannot consequently establish tribunals to determine their causes. [54.]

19th. Nor declare such vessels and the goods found on board of them confiscable, on the pretext that they are contraband or enemy's property. [55.]

20th. Losses thus caused to neutrals are to be accounted for by the state which established the tribunals. [55.]

21st. Which is bound to a just satisfaction and indemnity, that cannot be evaded on the plea of its being a cause which ought to be decided by its tribunals, and according to the laws of the country. [57.]

22nd. Nor can the sovereign of such a state elude the demands of another state in these sorts of affairs, under pretext of the form of government tying its hands, but the former has a right to look alone to the said sovereign.

SECTION SIXTH.

Of merchandise prohibited in time of war.

65. Ancient historians have left us but very few of the particulars of the proceedings of belligerent states in relation to the navigation and commerce of people who took no part in the war. Some strong acts of the Carthaginians, the Greeks and the Romans are lightly touched upon by them, from which we may collect that convoys for enemies' countries and be-

sieged places were not permitted. When Roman watermen carried from Italy to Africa subsistence to the enemies of the Carthaginians, the latter stopped them, but liberated them at the instance of the Romans. [Polyb. Hist. lib. 1. c. 83.] King Demetrius, surnamed Poliorcetes, having laid siege to Athens, and determining to reduce that city by famine, captured a foreign vessel, whose captain and first officer were hanged by his orders. [Plutarch in Demetrio. vol. 2. p. 804.]* Pompey, waging war on Mithridates, king of Pontus, in order to cut off his subsistence, caused the Bosphorus of Thrace to be beset by vessels, and menaced with death the merchants who should sail there. [Id. in Pompeio.]

66. Agreeably to the Roman laws it was high treason to supply enemies with provisions, arms, horses, silver, and what might be otherwise useful to them. The emperors Valens and Gratian forbade the sale to foreigners and barbarians of harness, bucklers, bows, arrows, swords and other arms. But this prohibition could affect only the Roman people, and none other. Nevertheless, as in succeeding ages, the bishop of Rome having arrogated to himself a universal dominion over Christendom, which was acknowledged, every where, in the time of the sacred wars, called crusades, pope Alexander III. made an ordinance which forbade carrying either arms, or iron, or ship-timber to the infidels or Saracens. Transgressors of this ordinance were condemned to the pains of excommunication, confiscation of their effects, and servitude. The law was general, binding upon all Christians of the Latin church, and was afterwards renewed by Innocent III. Clement V. and several other popes. The validity of this law was the less called in question because the advantage of religion and the church appeared to be a certain and necessary consequence of it. It was of this that popes Nicholas V. and Calixtus III. made use anew when the Portuguese, under the reign of Alphonso V. discovered Gui-

* This incident is omitted in the English translation. 5 Plut. 340. Ed. F, J.

nea, and other countries till then unknown in Africa, and flattered themselves with the discovery of more. They forbade in their bulls of 1454 and 1455, the carrying to the infidel inhabitants of those countries of either iron, arms, ship-timber or other instruments fit for attack and defence, on pain of excommunication if the transgressors were individuals, and of an interdict, if they were communities or towns.

67. As the pope, in quality of spiritual sovereign of Christendom and by virtue of the power attributed to him under this title, has strictly prohibited supplying infidels and Mahometans with arms and munitions of war, in order that they might not employ them against Christians, in like manner the usage has also been introduced in Europe for belligerent powers to interdict to neutral nations the carrying to their adversary goods which might be useful or necessary to them in war, with a menace, in case of contravention, to have the goods seized and confiscated as good prize. The exercise of which right, although altogether contrary to the universal law of nations, has met so many the less obstacles, because the European nations have adopted it as a general principle in the recent commercial treaties concluded among them. For we find in them, very exact specifications of the goods which it is forbidden to carry in time of war to the countries and ports of the enemy of either party, as we shall see presently.

SECTION SEVENTH.

Of the commercial treaties of the European states.

68. In the middle ages commerce in the Mediterranean was exposed to many dangers by the hostilities and depredations which the Saracens of Africa committed there against the Christians, and the latter against the former. For the protection of navigation and commerce the emperor Frederic II. in his capacity of king of Naples and Sicily, made a treaty of peace in 1230 with Abuissac, prince of the Saracens of Africa, by virtue of which neither of the parties was to exercise any violence or exactions against the other's sub-

facts. In the succeeding ages the petty states of the northern coast of Africa, those of Algiers, Tunis, Tripoli and the town of Salee subject to the king of Morocco, usurped a kind of empire over the Mediterranean. For when the European nations commenced navigation in the 16th century, and traded to the Levant, cruisers armed by these piratical states seized the European merchant vessels as good prize, and made their crews slaves. As it was very difficult to subdue these pirates by force, which could not be employed against them without great expense, the European states, for the security of their navigation, found themselves under the necessity of making treaties with them, and of granting them a species of tribute, under the name of presents. It is on this footing that the navigation and commerce of the French, the English, the Dutch, the Danes, the Swedes, and the Venetians rests in the Mediterranean and to the Levant. Other nations, like the Spaniards, the Portuguese, the Neapolitans and Sicilians and the Genoese, who did not choose to submit to such burthensome conditions are at perpetual war with these pirates and are thus incessantly exposed to their attacks and depredations.

69. The seas and rivers of Europe not having been heretofore less infested by other cruisers, this has been one of the reasons which have engaged the sovereigns and states of our part of the world to make treaties of commerce with each other. The oldest of these conventions contain this principal condition, that the subjects of the respective parties shall do each other no harm in their persons, vessels and goods, and that on the contrary they may freely and safely go and come by land and sea in the towns and harbours of one as well as another and in all other kingdoms and countries as they please. This is contained in the treaties which Edward III. king of England concluded in 1351 with the maritime towns of Castile and Biscay, and in 1353 with the Portuguese cities of Lisbon and Porto. In another treaty concluded 1417 between Henry V. king of England and John duke of Burgundy, there

is a similar condition stipulated and afterwards this one, that if the merchant vessels of the one party should be driven by stress of weather or enemies, they shall certainly be received into the ports and havens of the other, and that the goods which may be taken from them by pirates, shall not be there sent or sold on pain, should this be done, of restoring them, or paying their value to the owners. The same thing is to be found in many other commercial treaties of that time.

70. When the times as well as men became more enlightened and polished, maritime commerce became likewise more safe during peace. But in maritime war this safety disappeared, neutral merchant vessels being then well nigh abandoned to belligerent violence and vexations. It was therefore a just and necessary attention of the states which interested themselves in the flourishing of the commerce of their subjects, to prevent these inconveniences, or at least to diminish them. Here is another motive for the adjustment of so many commercial treaties. They commonly contain three principal articles: 1. A determination of the rights over merchandise and the advantages which a state sometimes accords to foreign merchants. 2. The exception of certain articles whose introduction or exportation is prohibited; and 3. the conditions on which navigation and commerce are to be permitted in time of war, in which one or the other of the contracting parties may be involved. This is the essential point of these treaties, and the only one which requires a particular discussion here.

71. We find it generally laid down in all commercial treaties, as a principal condition, that navigation and commerce ought to be free in the course of war, even with the enemy of one or other of the contracting parties. But this freedom is reduced under such narrow limits, and loaded with so many restrictions, as to be almost annihilated, at any rate very much diminished. One of these most inconvenient restrictions to neutrals is that which does not permit traffic in all kinds of merchandise, and the same in time of war that is permitted in time of peace. For, 1. arms and munitions of war destined

for enemy's countries and ports, are declared contraband and confiscable goods; and 2. trade with the enemy of either party with regard to free goods, is subjected to a restraint very prejudicial to merchants. We will proceed to consider these great inconveniences, one after the other.

72. In the first place as regards contraband goods, under which are comprehended arms, cannon, and all the munitions of war, the oldest commercial treaties contain nothing specific, but merely a clause that the contracting parties are not to succour one another's enemies. One of the first treaties that contains any thing precise respecting contraband goods, is that which was concluded 5th April 1614 between Gustavus Adolphus king of Sweden and the States General of the Low Countries. It is therein stated, "that neither will permit that enemies either then or thereafter may ever be assisted with counsel, men, money, munitions of war, victuals, or such like helps for their subjects; but they agree in forbidding their being aided with any thing which may give success to their schemes, and which would be injurious to his said majesty or to the said high mightinesses."

73. In the treaty of 1632, for the re-establishment of commerce between the kings of France and England, mention is also made of prohibited goods, but merely in general, without being particularly specified.

74. A treaty concluded in 1642 between the crowns of England and Portugal, declares arms and food contraband only in case they should be exported directly from the ports and possessions of Portugal to those of Castile (then the enemy of Portugal) which article is repeated in another convention made in 1654 between the king of Portugal and the king of England.

75. In like manner the king of Spain, in the commercial treaty of 1647 with the Hanse towns, excepts from the trade in other respects unrestricted with his enemies, only goods which might serve the purposes of war, and which should be drawn from Spain itself, which last could not be carried to the

enemies of his Catholic majesty, particularly the provinces of the Low Countries, with whom Spain was then at war.

76. In a treaty of commerce between France and the Low Countries, concluded in 1646, the following goods are specified as contraband, that is to say, "powder, muskets, and all sorts of arms, munitions, horses and warlike equipments: even ships are not to transport men for the enemy's service, in which case the whole shall be good prize, ship, equipment and goods."

77. A more complete detail of contraband goods is contained in the marine treaty which the king of Spain concluded with the United Provinces in 1650, wherein it is stated that "under that title shall be comprised all sorts of fire-arms, as cannon, muskets, mortars, petards, bombs, grenades" (other warlike implements, in French, saucisses, cercles poisses), "gun-carriages, sword-belts, powder, matches, saltpetre, balls, all other arms, as pikes, swords, helmets, casques, cuirasses, halberts, javelins and the like: under the same denomination is also prohibited the transportation of soldiers, horses, harness, holsters, breast-plates, of all sorts, fashioned and formed for the use of war. But under the said title of contraband is not to be comprehended wheat, corn and other grain, salt, wine, oil, and generally all that belongs to the nourishment and sustenance of life, which shall continue free, like all other merchandise not included within the preceding article, and free of transportation, even to enemies' places, excepting invested, besieged or blockaded places and towns."

78. From the middle of the seventeenth century there are no commercial treaties concluded among the powers of Europe, in which there is not a prohibition of the transportation of cannon, arms and all other munitions of war, to the towns and cities of the enemies of either of the contracting parties. But grain, vegetables, provisions and all other goods, are not included in this interdiction, unless they are carried to, besieged, blockaded or invested places. The commercial treaty which the king of France made in 1655 with the Hanse towns,

Lubec, Bremen and Hamburg, contains a designation of contraband goods, which agrees exactly with that of the treaty between Spain and the United Provinces, except that cordage and canvass are added to this one. It is moreover provided, in favour of the Hanse towns, that if their vessels should be compelled by the enemies to carry grain, vegetables, and other provisions to places attacked by the king, the commanders of his ships may retain those commodities, on payment of their just value according to estimation: but in default of such estimation and payment the Hanseatic vessels may freely withdraw with their goods.

79. The treaty of peace concluded in 1655 between France and the republic of England, comprises under the denomination of contraband, powder, pistols, guns and all kinds of arms, horses and every warlike equipment; it also prohibits the transportation of armed men for the enemy's service, on pain of confiscation of both ship and cargo.

80. The designation of contraband to be found in the treaty of the Pyrennees, concluded in 1659, between France and Spain, is the same as that contained in the treaty of commerce between Spain and the United Provinces in 1650. These two conventions agree perfectly, both as to goods interdicted and those declared free.

81. The treaty of alliance and commerce made in 1661 between the crowns of England and Sweden refers to the list of contraband not only all fire-arms and warlike munitions, but likewise silver, victuals, horses, harness, and ships of war. A new treaty of these two powers, in 1666, agrees exactly with the foregoing.

[The treaty of 1661 being very remarkable, I will subjoin here the eleventh article, which contains contraband. Subintelligi nullo modo debet, commercia et navigationem illi confœderato ejusque subditis ac Ineolis qui bello non est immixtus, cum hostibus illius fœderati, qui in bello versatur, omnino denegata esse. Cautum tantummodo sit interim, ne merces ullæ vocatæ contrabandæ, et specialiter nec pecunia,

nec commeatus, nec arma, bombardæ cum suis igniaris et aliis ad eas pertinentibus, ignes missiles, pulvis tormentarius; fœmites alias luntæ, globi, cuspides, enses, lancæ, hastæ, bipennes, tormenta, tubi catapultarii vulgo mortaria, inductiles sclopi vulgo petardæ, glandes igniaris missiles, vulgo granatæ, furcæ sclopetariæ, bandoliers, salpetræ, sclopeti, globuli seu pilæ, quæ sclopetis jaculantur, cassides, galeæ, thoraces loricatæ, vulgo cuirasses et similia armaturæ genera, milites, equi, omnia ad instruendos equos necessaria, sclopothecæ, balthei, et quæcunque alia bellica instrumenta, veluti nec naves bellicæ et præsidiariæ hostibus suppeditandæ devehantur ad alterius hostes sine periculo, si ab altero confœderatorum deprehendantur, quod prædæ cedant absque spe restitutionis.]

82. In the treaty of confederation and commerce which the States General of the Low Countries, in 1662, with the king of France, the same detail is to be found word for word of contraband goods, which is contained in the treaty of marine made in 1650 between Spain and the said Low Countries, [77.] which designation has remained without alteration in all the commercial treaties that have been concluded since, in the years 1678, 1697, 1713 and 1739, between France and the United Provinces.

83. The commercial treaty concluded in 1662 between France and Denmark prohibits, as usual, the transportation of cannon, all sorts of fire-arms and warlike munitions to hostile places, permitting that of wheat, vegetables, wine, oil, salt, and all other kinds of provisions, excepting however to besieged or blockaded places.

84. Of the same tenor is the treaty of peace made in 1667, between the kings of Spain and England, and the succeeding treaties of 1670 and 1713 are in full conformity, as regards goods prohibited and permitted.

85. In the treaty of commerce which the crown of Sweden made with the United Provinces in 1667, we find the ordinary designation of prohibited goods. But as regards those permitted, it is remarkable that there are expressly recited, silver,

wheat, vegetables, wine, oil and provisions, as also iron, copper, bronze, and every thing necessary for the building and equipment of vessels, such as pitch and tar, canvass, hemp, masts, timber, plank, cordage, anchors; which articles are confirmed by the new treaties of 1675 and 1679. On the breaking out of the war in 1667 between England and the States General of the United Provinces, the latter stipulated that during this war no materials of use for the building and equipment of ships of war should be carried to English ports.

86. The two rival states of the commercial world, England and the United Provinces, who both of them lay claim to general commerce, have formed several treaties, in order to prevent the differences which must needs spring from such a rivalry. A treaty of 1688 secures to both of their subjects a free trade with the enemies of each other, excepting contraband goods, under which are comprehended all sorts of firearms, powder, and other assortments for the purposes of war. But grain, vegetables, and in general all sorts of subsistence, are therein declared permitted. In another treaty of navigation and commerce, concluded in 1674, wherein a free trade in all unprohibited articles is stipulated, as well during war as in time of peace, there are, besides the abovementioned, many other commodities placed in the number of those which are free and permitted, namely, woollen stuffs and manufactures, linen, silk, cotton, and of whatsoever other materials, all kinds of habits and clothing, and the species and stuffs of which they are made, gold and silver, wrought into money or not, steel, iron, lead, copper, coals, corn, barley and others, salted hides, dry and salt fish, cheese, beer, oil, wine, sugar, salt, and all that belongs to the nourishment and sustenance of life, cottons, hemp, linen, pitch, cordage, sails, anchors, masts, plank, timber, and wrought wood of all sorts of trees, useful for building or repairing vessels. This designation of the permitted merchandise is more complete than is to be found in any of the other treaties made till now, and proves the great attention paid to obviating chicane. From a similar motive

appears to proceed the declaration interchanged by the two parties in 1675, concerning some passages relative to a free navigation to enemy's places; wherein they say explicitly, that "ships and vessels belonging to the subjects of both parties may and shall not only pass, traffic and trade from a neutral port or place to an enemy's, but also from an enemy's port or place to a port or place of an enemy of the other party, whether the said place belong to one and the same prince or state, or to different princes or states with whom the other party shall be at war."

87. The treaty made in 1674 between England and the United Provinces, the contents of which, we have seen, served as a model for that concluded between France and England in 1677; resembles it perfectly in all that concerns merchandises, as well prohibited as permitted in time of war, and free navigation and commerce to enemy's places: all which is repeated in the treaty between the same powers in 1713.

88. Many other commercial treaties, between France and England in 1669, between England and Denmark in 1672, between France and Sweden in 1701, between Denmark and the United Provinces in 1720, between Great Britain and Sweden in 1725, between the emperor Charles VI. and Philip V. king of Spain in 1734 and 1766, between Great Britain and Russia in 1752, between the king of the two Sicilies and the United Provinces, and finally in 1778 between France and the United States of North America, all agree in this, that in time of war, navigation and trade shall remain free with the enemies of either of the contracting parties, and that merely contraband goods, that is to say, all sorts of arms and warlike munitions, are excepted and confiscable: which constitutes also one of the most essential points in all commercial treaties recently concluded.

89. The treaty of peace concluded in 1661 between Portugal and the Low Countries contains a remarkable exception; by which the subjects of the latter are permitted to carry goods of all kinds, even arms and munitions of war not only

from their provinces, but from all other countries and ports to all places, even to those of the king of Portugal's enemies, provided that such goods were not transported thither from Portuguese ports. A similar condition occurs in the treaties which England made with Portugal in 1642 and 1654, and in that concluded in 1647 between the king of Spain and the Hanse towns.

90. Agreeably to all the beforementioned treaties, the right is manifest which belligerent powers in Europe have acquired to interdict, during war, to the subjects of neutral states, the trade and transportation of arms, munitions of war, and every thing else comprised under the denomination of contraband, to enemies' places, and to confiscate them, as good prize, in case of contravention. As regards enemies' vessels, and enemies' goods laden on board of them, there is no distinction between goods prohibited and permitted, both being, as well as the vessel itself, good prize and subject to confiscation. But inasmuch as according to a very common usage merchants often ship and receive their goods in foreign bottoms, it sometimes happens that enemies' effects are laden on board a neutral vessel, and on the other hand neutral effects in an enemy's vessel. The question therefore is: what rights have belligerents in such cases? Let us see what treaties have determined in this respect.

91. In an old book known under the title of *Consolato del Mare*, which is a collection of ancient maritime laws, or rather customs, these rules are prescribed to cruisers. 1. If the vessel taken be the property of a friend, and the goods those of an enemy, the cruiser may compel the master of the captured vessel, to conduct it to a place where the cruiser will have no cause to apprehend the vessel's recapture by enemies. But the cruiser ought to pay the master the entire freight which he would have received, if he had carried the vessel to where she was to have been discharged. If the master refuse to carry the vessel under the cruiser's command to a place of safety, the latter may sink the prize, tak-

ing care however to save the men. It is understood here that the whole cargo or the chief part of it be enemies' property.

2. If the vessel belonged to an enemy and the cargo to a friend, the merchants on board the vessel and the owners of the cargo should come to terms with the cruiser for a reasonable ransom of the vessel, as being good prize. But the merchants being unwilling to make such an arrangement, the captain of the cruiser may and ought to take the vessel with him and conduct her to the port of her outfit, and the goods are liable to pay her full freight to the said vessel, and in like manner as if she had carried the cargo to her port of destination, nor can they allege any charge against the cruiser for the damage which they may have sustained by this violence. But if they would have settled with him, and he refused through disdain, forcibly carrying off the merchants and cargo over which he had no right, the merchants are not at all obliged to pay him the freight, but on the contrary he should make them reparation for all the damage they have suffered, or yet may suffer by his violence.

92. According to the body of maritime law, in case the goods of a friend be found on board an enemy's vessel, and on the other hand if enemy's goods are laden on board a friendly vessel, the ownership of the goods only is regarded: from which follow these two rules: 1. Enemy's goods on board a friendly vessel are good prize and confiscable; and 2. The goods of a friend on board an enemy's vessel go free. These rules appear to be adopted and practised, when the case occurs, by the commercial nations of Europe. Several of the commercial treaties of the 14th and 15th centuries prove it.

93. In a treaty made in 1351 between Edward III, king of England and the maritime towns of Castile and Biscay, it is expressly stipulated that if the king of England's people should take any of his enemies' vessels at sea or in port, and any of the merchandise or other goods of those of the kingdom of Castile or county of Biscay should be found on board

those vessels, they should be restored to them, on their mere oath, which conduct they are in such case to observe toward the English. The same stipulation is made in another treaty concluded in 1353 between the same king, Edward the third, and the cities of Lisbon and Porto. According to these treaties therefore the goods of a friend on board an enemy's vessel were free.

94. A treaty of Edward IV, king of England with Francis duke of Brittany made in 1468 nevertheless ordains the contrary, to wit, that if the people of the country of Brittany should place their persons, property, or goods on board vessels of the king of England's enemies, without a safe conduct from him, nor during a truce with him, the English might take and acquire them; which should in like manner be permitted in like cases by the Bretons toward the English. This was therefore an exception to the rule beforementioned, and we shall remark another one hereafter.

95. Henry V, king of England and John duke of Burgundy agree in their commercial treaty of 1417 that merchants and masters of English and Flemish vessels shall not carry fraudulently or under any colour whatever, any goods or merchandise of the enemies of either of the contracting parties by sea, and that in case of their being interrogated by any skippers or other English or Flemish people, they shall make full and plain confession. Such a disposition is contained in the treaties made in 1478 between Edward IV, king of England and the dukes Maximilian and Maria of Burgundy, and in 1496 between Henry VII, king of England and Philip, archduke of Austria and duke of Burgundy. In the last of these treaties the following article is repeated and added to it; that if on such a confession and declaration, they should stop there that once, without pressing any further requisition, and it should afterwards appear that the inquiry had been answered falsely, he should be obliged to pay the demandant thus deceived by the false answer, as much of his own goods as would amount in value to the enemies' goods,

carried and concealed by him. According to these treaties enemies' goods laden on board the ship of a friend were good prize and confiscable.

96. If this rule was established in one treaty, and the other by which the goods of a friend laden on board enemy's vessels were free, was not expressly added to it; it was nevertheless recognised and avowed as a natural consequence of the first. And on this footing several commercial treaties have been since concluded, the last of which are those which England made in 1661 with Sweden, and in 1669 and 1770 with Denmark.

97. By the exercise of the right to seize enemies' effects in friend's vessels belligerents possessed themselves of power to visit merchant vessels, under pretext of discovering if they had on board goods belonging to the enemy or to enemy subjects. This visit gives rise to many disorders, violences and depredations, and thence becomes very inconvenient and prejudicial to people who traded much by sea, and the more because the belligerents sometimes pushed the rigor too far, even to declaring confiscable both the enemies' goods and the neutral vessels on board of which they were found. This is what happened to the merchants of the United Provinces, whose vessels laden with enemy's goods were taken by French ships of war and cruisers, and immediately pronounced good prize according to an ordinance of king Henry III, of the year 1584. The States General complained of it to the court of France, and effected by it the treaty of commerce which was made with them in 1646, by virtue of which the execution of the said ordinance was suspended during four years; so that the merchant vessels of the said subjects of the United Low Countries should be free and likewise render their cargoes free, even if there should be merchandise aboard, grains and vegetables belonging to the enemy, saving and excepting contraband goods, which on their part was to be observed by the United Low Countries toward the French. The treaty concluded in 1655 between

the king, Louis XIV, and the protector Cromwell is of the same tenor.

98. In the commercial treaty concluded in 1650 between the king of Spain and the states of the United Low Countries, the proceeding to be observed towards each other by the contracting parties, in time of war, with regard to each other's maritime commerce with their respective enemies, is still more clearly prescribed and expressed in these terms: "Whatever is laden by the subjects and inhabitants of the United Provinces in a vessel of the enemies of the king of Spain, although it be not contraband, shall be confiscated, together with all on board the vessel, without exception or reserve. But all shall be free and liberated in vessels belonging to subjects of the states, excepting contraband, even though the adventure, or part of it, belong to enemies of the king: whose subjects shall enjoy reciprocally the same rights and privileges in their navigation and traffic, with respect to the States General, as they enjoy with respect to the king of Spain." The treaties afterwards made between the same parties, in 1676 and 1714, establish the same rule without any alteration.

99. In these treaties the ownership of the goods was not considered, but that of the vessel. Hence have arisen these rules: 1. Free ships make free goods, and 2. A confiscable vessel condemns the goods on board. Now the vessels of friends and neutrals being free, enemy's goods on board of them ought also to be free. And as, on the other hand, enemy's vessels are confiscable, the goods of friends and neutrals laden on board of them will also be confiscable. It is therefore the bottom alone that decides absolutely the fate of the cargo.

100. With regard to neutral vessels, the question was not then known, whether the goods belonged to an enemy? but merely this, whether they were permitted or prohibited? and in order to ascertain that, the exhibition of passports and sea-letters was deemed sufficient, and visiting the vessel and

cargo were forbidden. Thus this new method of proceeding had not as many inconveniences as the old one: wherefore it is that it has been established as a constant rule in all commercial and maritime treaties made since, with very few exceptions, as is proved by those of Portugal and England in 1654, France and Spain in 1659, France and the Low Countries in 1662, 1678, 1697, 1713 and 1739, France and Denmark in 1662 and 1742, France and Sweden in 1672, France and England in 1677 and 1713, Spain and England in 1667, which treaty is confirmed throughout by those of 1670 and 1713, Portugal and the Low Countries in 1661, Sweden and the Low Countries in 1667, 1675 and 1679, England and the Low Countries in 1668 and 1674, the emperor Charles VI, and Philip V, king of Spain in 1725, Spain and Denmark in 1742, Denmark and the king of the two Sicilies in 1748, Denmark and the state of Genoa in 1756, the king of the two Sicilies and the United Low Countries in 1752, and finally that between France and the United States of North America in 1778.

[*Note.* The treaty of Utrecht is included in this recapitulation, that between France and England in 1713. The parties to these treaties embrace the nations of England, France, Spain, Holland, Denmark, Sweden, Portugal, the Empire, Sicily and Genoa. *Tr.*]

101. The treaties which the maritime powers of Europe have made with the barbarian states of Algiers, Tunis and Tripoli are also founded on the ownership of the vessel. Hence the Dutch, Danes, Swedes and others have acquired the right to load their vessels with goods belonging to nations having no treaties with those pirates, and which are consequently by them deemed enemies: for the free flag or vessel renders the goods free.

102. But as neutral merchants suffer a very considerable loss by the seizure and confiscation of their goods, laden on board enemy's vessels, and munitions of war destined for enemy's places, justice requires that in case the lading was

not made through their fault, confiscation should not take place. Now a lading made before the rupture or declaration of war not being to be considered but as made without fault, a neutral merchant has full right to reclaim his goods which were seized; to which case some treaties have had due regard. The treaty in 1677, between France and England, has fixed a certain period, before the term of which effects of the French and English were not to be condemned, but forthwith restored to their owners. This period was six weeks between the Soundings and the Naze of Norway, and two months between the Soundings and Tangiers, two months and a half in the Mediterranean sea, and eight months every where else.—In the treaty of commerce and navigation concluded between France and the United Provinces in 1678, the terms for the commodities of the French and Dutch, laden on board enemy's vessels, were fixed at four weeks in the Baltic or North sea, from Terneuse in Norway to the end of the British channel, at six weeks from the end of the British channel to cape St. Vincent, at six weeks from thence into the Mediterranean and to the line, and at eight months beyond the line, and in all other parts of the world. These dispositions are perfectly conformable to justice, as, on the contrary, it is manifestly unjust to condemn goods laden before declaration of war, and before it was known, and consequently to punish men who were ignorant of their having sinned. It is also equitably ordained in these treaties, with regard to contraband goods, that they should be restored to the owners, without being liable to be taken into enemies' ports.

103. Thus, as we have seen, in all the commercial treaties concluded for more than a century, the ownership of the vessel has been alone considered, and hence this new and general rule adopted, free ships make free goods. According to this rule neutral merchant vessels, with their lading, even though that be enemy's goods, with the single exception of contraband, are free; and, on the other hand, enemies' vessels and their whole cargoes, although belonging in part, or altogether

to neutral merchants, are confiscable. Only the treaties of England, in 1661, with Sweden, and in 1670 with Denmark, are founded on the ancient rule which regarded merely the ownership of the cargo, which declare the goods of a neutral merchant free in an enemy's vessel, and those of an enemy confiscable in a neutral bottom. The commercial treaties concluded in 1734 and 1766 between Great Britain and Russia are obscure and doubtful on this point, being uncertain whether they have adopted the new rule or the old one; which will of course depend on the construction put upon them in such cases.

104. Two other commercial treaties, concluded in 1655 and 1716 between France and the Hanse towns (Lubec, Bremen and Hamburg), make a remarkable exception to both the new and the old rule. For according to the first of these treaties not only their vessels are free, and render all their cargoes free, even though there should be goods on board belonging to enemies, but also goods found on board enemies' vessels, which shall be proved to be the property of inhabitants of the said towns, shall be restored to them. This disposition departs from the new rule, according to which the cargo of a neutral vessel is free, and that of an enemy's vessel confiscable, inasmuch as their goods, even though laden on board enemies' vessels, were to be restored to the Hanse towns. This agrees perfectly with the universal law of nations, and is a glorious testimonial of the equity and condescension of the French court at that time. But the other treaty, of 1716, is so much the less equitable, inasmuch as it subjects to confiscation, not only enemies' effects, laden on board of Hanseatic vessels, but also those of the latter, on board enemies' vessels. This openly contradicts the ancient rule, according to which the goods of an enemy, in a friendly or neutral vessel, are, to be sure, confiscable; but, on the other hand, those of a friend or neutral, in an enemy's vessel, remain free. [92, 96.] Goods of the Hanse towns, found on board enemies' vessels, ought therefore by right to have been free. Nevertheless by this

last treaty they are declared confiscable, which seems quite repugnant to equity and justice. But that occurs here which occasionally happens in the course of events. The rights of one party are often too much enlarged, and those of the other party too much restrained. The strongest gives law to the weakest, and the latter is obliged to submit to it, though never so detrimental.

105. The obligation of treaties is perfect on the parties to them. But this is the question now, whether they have any obligatory force on others, besides the contracting parties, which shall be discussed in the following section,

SECTION EIGHTH.

Of the Freedom of the Navigation and Commerce of Neutral Nations, restricted in time of War by the European Law of Nations.

106. Since the commerce, and particularly the maritime commerce of the people of Europe has become so great, and extended throughout all the globe, the general interest taken in it by all people has given birth to many usages and customs, which by tacit consent have acquired the force of law, and constitute a considerable part of the European law of nations. These usages have therefore imposed certain new obligations on the commercial nations of Europe, which are not founded on the universal law of nations. The commercial treaties will inform us of these usages, and of the obligations resulting from them. It is true that particular treaties bind only the contracting parties; but if all the commercial treaties brought into view here agree in certain usages and customs, they may be regarded as universally recognised. It has been already remarked [11.] that the agreement of treaties, made from time to time between the powers of Europe, in certain points therein regulated, serve as proof of the European law of nations. The agreement of commercial treaties in certain principles and usages may then also serve to prove the European law of nations in commercial affairs. And to

this end princes themselves allege these treaties, of which we shall hereafter have examples.

107. We will here consider commerce only in time of war. Let us see what principles and usages can be deduced from so great a number of treaties, in order to learn from them what the European law of nations directs in commercial affairs, and what laws they prescribe thereupon to neutral people during war.

108. The universal law of nations allows a commerce entirely free to the subjects of neutral states, as well in time of war as in peace, even with enemies of either of the belligerent parties, and in all kinds of merchandise. [31, 32.] It is only in countries conquered by one belligerent from another, and to places besieged or blockaded by him, that he has a right to interdict neutral commerce. [37, 38.] But the European law of nations founded on treaties, has placed narrower limits to this freedom of commerce which is considerably restricted by these treaties. The following general rules are deduced from them:

1. Neutrals have a right to trade in time of war as in time of peace in all kinds of merchandise without exception, but only among themselves.
2. Trade with the enemy of either of the belligerents also remains open to them, but with the exception of warlike munitions, and generally of all sorts of merchandise serviceable for war; which are not to be carried to enemies' places, and are thence called contraband.—
3. Grain, vegetables, and other provisions, salt, oil, wine, and in general whatever contributes to the nourishment and sustenance of life, as well as generally all other merchandise not serving for war are accounted free and permitted.
4. But neither these nor contraband can be carried to places besieged, blockaded or invested, which agrees with the universal law of nations.
5. Money is not included in contraband, any more than masts, wood and all other materials necessary for the construction and equipment of vessels. Only the treaties concluded in 1661 and 1666 between England and Swe-

den, make an exception to this, by counting money, stores and ships of war prohibited articles. [81.] On the other hand, in the treaties between Sweden and the Low Countries, in 1667, 1675 and 1679, money, grain and other provisions, and even all that can serve to the construction and equipment of vessels, are found specified as articles of contraband. The treaty between England and the United Provinces in 1674, and that between France and England in 1677, also place all these effects, and explicitly gold and silver, whether wrought into money or not, in the number permitted. [85, 86, 87.]

6. Contraband goods are liable to confiscation: the vessel, together with the residue of the lawful cargo on board, remain free. But if military men are transported for the enemy's service, the vessels, with all their apparel, and the whole cargo, shall be confiscated. 7. Merchant vessels of neutral nations, bound to neutral ports, even though laden with contraband, cannot be stopped nor seized. 8. Not even when bound for enemies' ports, provided they are not carrying contraband thither. If seized, they should be restored with costs and damages. 9. Masters or captains of neutral merchant vessels should be provided, in time of war, with passports, sea-letters, and other papers, which are mentioned in treaties under the names of certificates, bills of lading, charter parties, in order to render an account, as well of themselves and crew, as of the ownership of the vessel and quality of the cargo. All these papers should be genuine and authentic. Without these qualities, or if there are several bills of lading and charter parties, which do not agree, the master becomes suspicious on that account, and exposes himself to great embarrassments; and he should also take care that none of these papers be missing. 10. If the ships of war or cruisers of the belligerents fall in with neutral merchant vessels, either in roads or on the high sea, they are not to approach nearer to them than the reach of cannon-shot. They are to send their boat on board of them, but with two or three men only, to whom the master, in order to make certain his places of de-

parture and destination, is bound to show his passports and sea-letters, to which full faith and credit are to be given, without stopping the vessel in her course. 11. Although contraband goods are good prize, when laden on board a neutral vessel, bound for an enemy's port, and confiscable, it is nevertheless forbidden to the captains of ships of war and cruisers to open bales, boxes or hogsheads, or to take or sell them, but they should take the vessel into a port of their sovereign, (a) where the goods shall be discharged in presence of the admiralty judges, and after being inventoried by them, confiscated by sentence of the court of admiralty; or other competent judges. But if the contraband goods composed but part of the cargo of the neutral vessel, and the master thinks proper to surrender them to the captain of the ship of war or cruiser, he cannot be at all prevented from following his destination. 12. Belligerent ships of war and cruisers are not to commit violence on neutral vessels, wherefore the captains and owners are bound to give good and sufficient (solvent) bail to answer for the malversations which they may commit in their cruises. In the commercial treaty of 1662 between France and the Low Countries, the amount of this bail is fixed at 15,000 livres tournois, in that of 1677 between France and England; at 1500 pounds sterling, or 16,500 livres tournois; and if the privateer's crew should exceed 150 men, to 3000 pounds sterling, or 33,000 livres tournois. This last treaty likewise directs that, in case the privateersmen treat the masters, seamen or passengers of the captured vessels inhumanly and cruelly, in order to extort from them such confessions and declarations as they require, they shall be rigorously punished, and the vessels taken restored, together with their cargoes, without

(a) Or if that is too distant, into any neutral port, as an English cruiser lately took a French prize into Leghorn; but having made the capture too near to that place, and so violated the neutrality, the grand duke of Tuscany condemned him to restore the prize with costs and damages. The sovereign of the place, consequently, in cases of this sort, is a competent judge.

further discussion, judicial or extrajudicial. 13. Visiting neutral vessels, provided with good passports and sea-letters regularly, does not take place. In the commercial treaty concluded between France and England in 1632, it is altogether prohibited, by reason of divers violences committed under this pretext. [73.] For the same reason almost all commercial treaties do not permit it. Visiting is permitted only in the treaty between England and Sweden, in case the passports and sea-letters are not exhibited, or if otherwise urgent suspicions exact it. 14. Captains of vessels of war and cruisers should be informed of the contents of commercial treaties concluded by their sovereigns, in order to observe them the more exactly, and to give no occasion to complaints and grievances. This is an article inserted in some commercial treaties, though to be understood independently.

109. The question yet remains to be discussed: what does the European law of nations prescribe in case of neutral goods, laden on board an enemy's vessel, or, on the other hand, enemy's goods on board a neutral vessel? The ancient commercial treaties contain proof that it was heretofore a general custom to confiscate the goods of an enemy and of an enemy's subjects, laden on board the ship of a friend, and to liberate the goods of friendly merchants found in an enemy's vessel. The ownership of the cargo only was regarded, and this rule was drawn from it: Enemy's goods in a friend's ship are confiscable; a friend's goods in an enemy's ship are free. This custom, established by general consent, was therefore, in this point, the European law of nations. It furnished ships of war and cruisers with a double pretext for stopping and searching neutral merchant vessels, 1. For contraband, 2. For enemy's goods; which gave occasion to a great deal of violence, pillage, bad treatment of masters and seamen, tedious and procrastinated law-suits before admiralty courts, which was a great inconvenience for the neutral merchants.

110. It was on this account that, since the middle of the last century, the nations of Europe abandoned this ancient

custom, and this ancient law of nations, and adopted new principles and usages, according to which a neutral vessel, because it is free, renders free the goods on board of it, although the property of the enemy or enemy's subjects; and, on the other hand, an enemy's vessel, because confiscable, renders confiscable the goods of neutral merchants, found on board of it. Such is the new European law of nations, according to which only the ownership of the vessel, and not that of the cargo, is considered. Thus in a neutral vessel the cargo is free, and in an enemy vessel it is confiscable. [95, 99.] By which the navigation and commerce of neutral nations have been delivered from part of the inconveniences of war, the cruisers of belligerents having no longer a right to search neutral vessels for enemies' goods.

111. From the year 1646 down to this time (1780) the powers of Europe have made almost all their commercial treaties conformably to this new principle, as France, Spain, England, Portugal, Denmark, Sweden, the king of the two Sicilies, the United Provinces, the state of Genoa; and this not only among themselves, but with the piratical states of Africa. [99, 100.] Instead of which the old usage of confiscating enemy's cargoes in neutral vessels and releasing enemy's cargoes in neutral vessels has been preserved only in the treaties made by England with Sweden in 1661 and with Denmark in 1670. [103.]

112. It would seem that with reference to enemy's goods in neutral vessels and neutral goods in enemy's vessels the European law of nations is doubtful, inasmuch, as commercial treaties contain opposite and contradictory principles and usages on this point. But as all the new treaties have adopted the principle that the cargo of neutral vessels is free and that of enemy vessels confiscable, this should be considered as the regulation, and the two ancient treaties, in which the old principle is retained, confiscating enemy's goods in a neutral vessel and liberating neutral goods in an enemy's vessel, are to be considered an exception. For it is evident

that the people of Europe have by little and little abandoned the old usage and adopted the new one, and of consequence changed their law of nations. [12.] Thus between England and Sweden, and England and Denmark the old usage continues, because these powers have retained it in their before-mentioned treaties. But these particular and peculiar treaties cannot be advanced as proofs of the European law of nations, because it has been changed by the new usage established in the new treaties of commerce of which there is so great a number; though if two nations do not agree about it, the universal law of nations must decide between them.

113. According to this new law of European nations it is then but the ownership of the vessel that is to be regarded. If that be neutral it is free with all the cargo, even though belonging to the enemy in whole or in part. On the other hand if the vessel be enemy, it is confiscable with all the cargo, although neutral merchants be the owners of it. Nevertheless natural equity requires that the goods of neutral merchants laden before a declaration of war in enemy's vessels should continue free and not be confiscated: which equity was therefore recognised in the treaties made in 1677 between France and England, and in 1678 between France and the United Provinces. Those powers therein settle, in favor of neutrals, certain terms to be observed after declaration of war, in proportion to the greater or less distance of countries. Such an exception reasonably takes place for contraband goods shipped by neutral merchants before declaration of war, on board of either their own vessels or those of the enemy. [102.]

114. It is a common article in commercial treaties that before admiralty courts pronounce sentence on enemy's vessels, or contraband goods shipped on board neutral vessels, taken by ships of war or cruisers of belligerents, whether these vessels and goods are good prize or not, the captains of the ships of war or cruisers should not claim them as theirs. [108-11.] As it is a very extraordinary pretension and quite contrary to the principles of public law and of the universal

law of nations to exercise jurisdiction over the subjects of a foreign state, and in affairs whose nature and quality by no means admits of it, [53-56.] the question is; whether the admiralty courts of the belligerents are authorized by the European law of nations, and consequently whether all the states of Europe are bound to recognise this foreign jurisdiction, considered by itself, destitute of all foundation? It cannot be denied that the institution of such tribunals is an usage established for more than two centuries, which appears to be in no way doubtful as regards this jurisdiction itself. It has however been sometimes disputed. And inasmuch as some admiralty courts observe a proceeding very different from that of others, and very like the irregular proceedings of the Spanish inquisition, it would be rather too much to insist that neutral states should submit with entire resignation to such a jurisdiction, unless they are expressly obliged to it by treaty. As it is the usage of the inquisition, although contrary to all known principles of jurisprudence to have a man arrested, often a very simple and uninformed one in religion on a denunciation that he is heretic or heterodox, the proceeding of the belligerents is not less strange in this that their ships of war and cruisers stop and seize neutral vessels on the bare suspicion that their cargo is either enemy's or contraband. And as the prisoner of the inquisition from the first moment of his confinement, is placed together with all his property, which this unmerciful tribunal seizes as soon as he is arrested, in the hands of the inquisition, so the master with his vessel and whole cargo is at first in the cruiser's power and afterwards in that of the court, and even of a court, which has no jurisdiction over him. The poor prisoner of the inquisition must confess his crime without knowing in what it consists. He is cross-questioned to force him to confess what is wanted, during all which time he is detained prisoner. In a manner not less strange, the admiralty courts put many captious questions to the master of the vessel and the seamen, to which it is often very difficult for them to give answers without

committing faults, being unacquainted with the language and the laws of the country. The burthen is cast on the master of proving that the vessel and goods belong to him and to those who adventured them, whereas by every principle of jurisprudence the cruiser alleging the contrary, and for that reason having seized the vessel, ought to prove the foundation of his allegation. But he is dispensed from it, and yet the vessel is often detained several months, and even a whole year before the cause is decided. The prisoner of the inquisition, though innocent, never escapes without being well plucked by process. Exclusive of his sufferings in prison and other grievous vexations, he is always stripped of his property, in whole or in part, under the title of costs. The fate of the master and his vessel is not more fortunate. For if after a long detention he should be ultimately liberated, the consequences of so irregular a proceeding are nevertheless very prejudicial to him, as loss of time, and of opportunity for making an advantageous sale, the wasting of the cargo (all of which are never made good to him notwithstanding a judgment in his favor for damages) and not seldom the expenses of the proceeding. In England a rule has been established in the admiralty courts that a neutral vessel seized ought with the whole cargo be considered enemy property, in case the ownership of the vessel and goods be not directly proved by the papers found on board, or by the oath of the captain and superior officers, and that in case different proof be afterwards made, the master shall be condemned not only in costs of suit, but also in damages for the seizure, that is to say, for the violence unjustly committed by the cruiser. In France they are still more rigorous. According to the king's ordinance published at the commencement of the present war, the papers found on board the vessel at the time of her seizure, are alone to be received in evidence, and no credit is to be given to such as are afterwards brought. To judge by these proceedings, the courts of admiralty seem to presuppose that he to whose property another lays claim ought to have his

proofs of property all ready. This principle is strange and unheard of. In no court is the defendant (who is in this case the master of the vessel and the owners of the cargo) bound forthwith to produce his documents, because sometimes the nature of the cause renders it impossible, and it is sufficient if he produce them within the periods fixed by law. His cause stands therefore, if finally he be absolved from the unjust pretensions of the plaintiff (who is the cruiser) equally good, whether he produced his proofs in the beginning of the cause or afterwards. Consequently there exists no valid reason for condemning him to costs of suit. In all well regulated courts of justice, he who advisedly institutes an action maliciously or rashly, is condemned to pay the costs, but he who merely commenced a cause probably just, is released from them. According to these principles let us compare the conduct of the two parties in the present case. The cruiser forcibly seizes the vessel and cargo, on the mere suspicion or the pretext that one or both of them are enemy property. He demands of the admiralty court an adjudication of the vessel and goods, or of the latter only, if the vessel is neutral. According to all laws he is bound to prove the truth of his presumption or pretext, the seizure of the vessel and cargo being founded solely thereon. Instead of which the master of the vessel and the owners of the cargo, although their possession is a legal presumption in their favour, are very unjustly burthened with proof of their property, and to this purpose, if this proof be not forthwith produced at the first term the owners are condemned to expenses, and even to the payment of those of the captor, who nevertheless is no better than a malicious plaintiff or at least a rash one, just as as a familiar of the inquisition often performs the part of a malicious informer. This proceeding therefore is altogether tumultuary and perfectly like that of the terrible tribunal of the inquisition: by all which it is perceived to how many vexations the commerce of neutrals is exposed by proceedings so arbitrary; for captors, like familiars of the inquisition,

may count on the countenance of the judge, it being convenient, as is said, to church and state, to encourage men of this kind, and not to discourage them.

115. If commercial treaties subsist between two states, the jurisdiction of admiralty courts produces fewer controversies, inasmuch as their conventions establish at least the first principle, agreeably to which sentences are to be conceived; but in the absence of these conventions, matters of dispute arise in abundance. Let us suppose the case that the cruisers of a belligerent state seize the vessels of a subject of a neutral prince. The tribunal which ought to pronounce on the validity of the prize, declares the merchandise therein laden to be confiscable, because they are enemies' property. The sovereign, whose subjects have been condemned, alleges, on the contrary, that their vessels, as neutrals, being free, the merchandise found on board of them should be so too, even though the property of enemies. Both parties appeal to the law of nations. Then they do not agree on a first principle, conformably to which sentence is to be given: for one of the parties insists that it should be conceived agreeably to the ancient law of European nations, while the other wished it to be pronounced according to the new. The latter is incontestably right in this case, because ancient laws are annulled by new ones. Nevertheless it is a necessary consequence of this contradiction, although obviously unjust on the one part, that the European law of nations is not herein applicable. Hence the cause is transferred to the universal law of nations, [13.] and cannot be adjusted but by negotiations between the respective courts.

116. It is an ancient custom of maritime powers to publish, at the commencement of a war in which they are engaged, ordinances or notifications in which they prescribe to neutral powers the laws to be observed by the latter in their navigation and commerce during the war. The universal law of nations, as has been shown already, [44.] does not authorize these ordinances: nevertheless that of European nations

has rendered them in some sort valid, but only with respect to goods commonly reputed contraband in time of war. For as to this all Europe is agreed. [108, 2.] As to cheese, provisions, silver, wood and other materials necessary for the building and equipment of vessels, and all other commodities which otherwise constitute the subjects of commerce, the belligerent ordinances cannot extend to these effects, because they are free and permitted goods, [108, 3.] except in cases when it was forbid, by particular treaties, between two sovereigns to carry either sort of these effects to enemies' countries. It is the same as to enemies' goods laden on board neutral vessels. They are free according to the new law of European nations; and if the ordinances of belligerents threaten them with seizure and confiscation, that can take place only towards the subjects of powers, which have concluded commercial treaties with either of the belligerents, wherein the ancient law of European nations, which permits such seizure and confiscation, has been retained. So much the less have belligerents a right to interdict commerce altogether with enemies and enemies' countries. It is true that this is sometimes done; but the other powers have always opposed such edicts, either by protest, or sometimes by actual resistance.

SECTION NINTH.

Historical Abridgment of some Remarkable Differences between Belligerent and Neutral Powers, respecting the Freedom of Commerce and Navigation.

117. Would that we could display here glorious testimonials of the justice and humanity of the people of Europe and their sovereigns. But alas! it will be but a picture of many facts, by which not only the law of nations, universal and particular, but even the most solemn treaties, have been violated. We shall herein find a strange contrast in the principles by which princes and people have been actuated in different times, although in similar cases. We shall see them arbitrarily weigh right and wrong, solely in proportion to

their interests, their advantage or disadvantage. We shall see them in the quality of belligerents give laws to neutrals for their commerce, without being willing, as neutrals, to receive them from any other belligerent. We shall see, in short, the feeblest sacrificed to the rapacity or caprice of the strongest. If we would draw a general maxim from the actions of some belligerents, it might be this: "We desire that others should do us justice, but do not hold ourselves bound to do justice to them; or, what comes to the same thing, we will not suffer others to treat us in the manner in which we treat them."

Id esse regni maximum pignus putant

Si quidquid aliis non licet, solis licet.

Seneca in Agamm. v. 287.

They therefore abolish natural equality, placing themselves, in their affairs with others, above law and equity, thus breaking the strongest bond of society, which cannot subsist without justice and reciprocal duties. The consequences of this way of thinking will soon appear in the great number of differences to which commerce has given birth, in time of war, between the states and people of Europe.

118. Since the union of Calmar, the three kingdoms of Denmark, Sweden and Norway were under the government of a single king. The Swedes having revolted in 1501 against John, then king, who would have reduced them to obedience by force, he demanded of the Hanse towns not to meddle in the affair, nor to carry provisions or arms to Sweden. For this purpose he sent an embassy to Lubec to solicit them, but with a menace to treat them as enemies, in case they should carry provisions or other commodities to the Swedes. They replied that this affair did not concern them, that being neutral, they should carry on their commerce, and that none could interdict them the freedom of navigation. The king persisted in his resolution; and had the Lubec vessels trading to Sweden seized and confiscated as good prize, which occasioned a war between them. The Lubeckers made complaints of it to the

emperor Maximilian I, and obtained in 1505, an imperial mandate to some German princes for the protection of the Lubeckers, and to refuse passage through their territories to the troops raised for the king. The emperor also wrote to the king not to trouble the Lubeckers in their free commerce in the Baltic sea. But the Swedes having been for some years, on a demand of the Danish counsellors of the kingdom, put by the emperor under the ban of the empire, and the king calling this to mind, a change of sentiment was occasioned by it, because it did not appear to be proper to protect people who were under the ban of the empire. From all which, however, it appears that such interdicts of commerce by belligerents have not been acknowledged by neutral states.

119. The allied kings of France and Spain, Louis XII, and Ferdinand the Catholic, having conquered the kingdom of Naples, in the beginning of the sixteenth century, the division of this conquest produced quarrels between them, and finally a war, wherein at first the Spaniards were reduced to great straits, inasmuch as they were in want of every thing, and particularly money, provisions and warlike munitions. The deficiency of the latter was, however, in some manner repaired by the connivance of the Venetian senate, who did not forbid the purchase of a great deal of saltpetre for the use of the Spaniards. The king of France complained of this to the senate, who made answer, "that it was done without their knowledge by particular merchants, and that at Venice, as a free city, no one was prohibited from exercising his trade and business." The senate thus made a proper distinction between what it had done itself, and what was done by merchants. It maintained the free trade of the latter in time of war, and without exception of any merchandise. *Guicciardini's History of Italy, lib. 5. p. 145.*

120. Gustavus I, king of Sweden, on the occasion of a war which was on the point of breaking out between him and Russia in 1566, sent an embassy to Mary, queen of England, to intreat her to prohibit her subjects from navigating the

North sea to Russia, in order that that enemy of Sweden might not be so much enriched, nor so abundantly provided with munitions of war. The queen, with her husband, king Philip, made answer that "she could not deprive her subjects of liberty to trade wherever they could for the best; but that she, nevertheless, would take care that they should not carry munitions of war to the enemies of Sweden." They were then solely regarded as contraband goods, and beyond these the queen would prohibit nothing. *Dal'm Suea Rikes Hist. del. 11. b. 2. c. 8. s. 14.*

121. In the beginning of the troubles of the Low Countries, from which the republic of the United Low Countries took its existence, navigation and trade, in the German ocean and in the British channel, were disturbed, in 1574 and 1575, by the violence and robberies of *sea-beggars*, as they called the seamen of a fleet which the Hollanders and Zealanders, persecuted and exiled by the duke of Alba, among whom there were many gentlemen and merchants, had equipped at their own expense, under the auspices and with commissions from the prince of Orange. The object of these armaments was at first only to make war on the Spaniards, and to take their vessels. But a greediness for booty soon caused the sea-beggars to forget the distinction between friends and enemies, both of whom suffered considerably by their pillage. Several nations, which navigated in the channel and in the German sea, were in consequence obliged to pay a sort of duty on their vessels, in order to guarantee them against the peril which threatened them. The prince of Orange had his collectors at Calais, who raised these duties, and in return for them insured the vessels against the attacks of the Hollanders and Zealanders; for it was under the name of insurance that these duties were paid. The Spaniards gave ten, and the Portuguese eight per cent. The court of France not only allowed this to be done, but even that five per cent. should be demanded from its own subjects. This was a very considerable revenue for the prince of Orange and the new republic

of Holland and Zealand; which amounted, as was said, to a greater sum than that proceeding from the customs of all the Low Countries, although the latter was then more than a million a year. But this profit was of short duration. The sea-beggars not being able to gain as much as they made before by piracy, began upon their old trade, so that the insurances of Calais naturally ceased. (a) We must admire the king of France's connivance at this sort of contribution, which was not at all authorized by the law of war. The only motive for permitting the levy of it seemed to be hatred against Spain, and compassion towards unhappy and oppressed people.

122. The English would not submit to this contribution. They insisted, on the contrary, and rightly, on navigation and free commerce with the Spaniards, and all places under Spanish dominion, notwithstanding the war made against Spain by the Hollanders and Zealanders. The latter seized, therefore, some English merchant vessels, and carried them into ports of Zealand, under pretext that they were carrying provisions to Dunkirk, and goods of Antwerpers and others to Spain, under false names. The admiralty of Zealand declared the vessels taken good prize; but queen Elizabeth would not acknowledge either the proceeding of the Zealand cruisers, nor the sentence of the admiralty of Zealand. She had four of them arrested at Plymouth in 1576, who were not released till after the satisfaction she demanded was obtained. It was therefore regarded in England as a great injustice on the part of the belligerents to endeavour to prescribe laws to neutrals in their commerce, and to exercise jurisdiction over them, which moreover was entirely contrary to the universal law of nations. [34, 54.] *Camden Annal. rer. Anglic. Regn. Elizabetha.*

123. But their language and sentiments were altered in 1589 after the rupture between England and Spain. The English undertook an expedition to Lisbon to introduce Don Antonio

(a) Reid Belg. Annal. lib. 1, p. 18. Grotius Annal. lib. 2, p. 38, 46.

who had taken the title of king of Portugal, into that kingdom conquered by the Spaniards. The enterprise failed. But on the return of the fleet the English seized sixty vessels belonging to the Hanse towns loaded with grain and materials for the construction of ships. Those towns complained of this as a most unjust violence and insisted on reparation for the damage; alleging their neutrality and the freedom of commerce. They were put off with the answer that the queen had cautioned them by letter on pain of the loss of their vessels and goods not to carry provisions or warlike munitions to Spain or Portugal. The goods were confiscated, which, as the queen said in a declaration made to the emperor who interested himself for the towns, was conformable to the rights of war and the laws of the kingdom. As to the vessels, she had them restored. Several writings were published on both sides, for and against the justice of this proceeding: but that did not change the affair. No other consolation remained for the towns after their loss but patience, because they were not strong enough to take vengeance on the English, as they had done on the Zealanders. This proceeding of the English against the Hanse towns was very arbitrary and nowise justifiable, neither by the universal law of nations nor by that of Europe. [32-3-108-3-5.] Camden.

124. Albericus Gentilis, a famous lawyer of his time, and law professor in the university of Oxford, who defended the cause of the English in this quarrel, has treated it very artfully and like a true sophist. He acknowledges that "the Hanse towns had the mere law with them, but maintains at the same time that equity is on the side of the English. He says that the cities did not wish to lose the profits of their business, and that on the other hand the English would not permit any thing contrary to their safety; that the right of commerce was just, that of defending one's safety more just; that one was the law of nations, the other the law of nature, one the right of individuals, the other the right of kingdoms. Commerce must yield then, he adds, to kingdom, man to nature, money

to life." Who does not see the false reasoning of this nonsense! It is vain that he makes such a stir about equity. If the English regarded grain and naval munitions as goods which might be injurious to them or even dangerous, they had a very simple way to prevent the damage and the danger. They had but to buy the commodities. Equity and the law of nature enjoin a preference of gentle means to harsh ones. The English then were bound to make use of the former, but they chose the latter. Was that equitable? We shall presently see this same author support the very contrary of what he has here advanced. Alberic. Gentilis de jure belli lib. 1. c. 21.

125. In the war which queen Elizabeth made against Philip II, king of Spain, she caused a general interdict to be published, according to which neither provisions nor arms were to be carried to the country of her enemies; because, she said, that by the right of war, she intended to reduce them to peace by famine. This interdiction of trade in grain was very inconvenient to several nations. The commercial towns of Prussia did not suffer less by it than the other Hanse towns. Sigismond III, king of Poland, in 1597, sent an ambassador to the queen with complaints, because that, contrary to the law of nations, trade with the Spaniards was forbidden to the Prussian towns, and that under this pretext their goods had been confiscated. The ambassador represented this to the queen in a Latin harangue, and with some threats demanded restitution of the effects seized, and free navigation to Spain. The queen was very much offended, and made answer to him that since he chattered so much about the law of nations, he ought to know that in a war between kings, it was permitted to one of the parties to intercept succours sent to the other, in order by such means to ward off what would be prejudicial to it. That, said she, is the law of nations, and it was in this manner that the kings of Poland and Sweden proceeded in their wars with the Russians. Now even the Hanse towns having carried their complaints for the goods which had been

taken from them by the English to Portugal, and making projects for the ruin of the English trade in Germany and in Poland, the queen by her envoy George Carew had a declaration made to the king and states of Poland and to the Russian towns that *through favor* she would permit the free transportation of grain and other goods to Spain, with the exception only of warlike munitions, although by the law of war effects carried to the enemy were confiscable. As the Danes had similar grievances, to those of the Hanse towns for the vexation of their trade, Christian IV, king of Denmark, also caused complaints to be made to the court of England, and received the same satisfactory reply, that the effects of the Danish subjects should be restored to them if any had been seized, that they would not be arrested for the future, and that it would be permitted to carry grain and all sorts of goods, except munitions of war, to Spain. Thus the queen at last recovered from her unjust rigour. But it was not a favour, as she expressed herself, but purely a recognition of rights given to all neutral nations, by the universal law of nations as well as that of Europe. Grot. Hist. lib. 6. p. 256. Camd. Annal. Eltz. P. 14. p. 692.

126. There was another dispute of an older date between England and Denmark. From the year 1553 the English had begun to carry on commerce with Russia by the way of Archangel. The king of Denmark, Frederick II, thought he had a right to interdict this navigation, because it was carried on between Iceland and Norway which were both under his dominion. The English answered that the great high sea was open to every one, and Halberg, a famous Danish historian acknowledged himself that the right was plainly on their side. For if, said he, navigation could be interdicted to him who is to pass near to one country in order to go to another, France and England would have a right to keep the people of the north from the passage of the British channel, and Spain might exclude the whole world from the Mediterranean sea. In truth the pretension to interdict na-

vigation between Iceland and Norway appears a little strange. For although both the countries be subject to the same sovereign, there is nevertheless no strait between them, but a great ocean, which at its smallest distance is one hundred and fifty geographical leagues broad between the two countries, over which no sovereignty can have place. [21, 22.] Nevertheless king Christian IV, renewed this dispute in 1598 at the commencement of his reign, after it had been long at rest. The real motive for such a demand was the diminution of the sound duties; occasioned by the use of the new passage to Russia; which was also alleged to the part of Denmark. In this quarrel, which also continued for a long time, England always supported the freedom of the sea, although mostly she never admits it but with great restrictions.

127. England has had many differences with other states on the freedom of commerce. I shall cite two which appear to be particularly remarkable. An English vessel loaded, besides other merchandise, with a quantity of cannon, powder and warlike munitions and destined for Constantinople, was taken by the knights of Malta, and the Sardinians, who, as subjects of the king of Spain, were cruising against the Turks. The English made complaints and demanded restitution of the vessel and goods. Albericus Gentilis, of whom I have before spoken, maintained their claim. He alleges in the first place, in order to make the decision according to the ordinary method of lawyers, many passages from the Roman and canon laws against the cause of the English, as reasons for doubting, and finally draws the conclusion from them that as the English were not subjected to the Roman laws nor to those of the pope, and their king, James I, not having forbidden them to trade with the Turks, no other prince could punish them as guilty of a transgression of these laws. This reason of deciding which Albericus Gentilis here employs in favour of the English, is equally applicable to the cause of the Hanse towns, whose grain and naval munitions the English had seized and confiscated in their war against Spain. For

as little as the English were subject to the Roman and papal laws, the Hanse towns, were no more obliged to obey the ordinances of the queen of England, and for the same reasons that the knights of Malta and the Sardinians could not punish the English, the latter had no more right to punish the Hanse merchants. The jurisprudence of Gentilis is like a whirligig, which turns with every wind. He was always ready to pronounce just to-day what he had acknowledged unjust yesterday. But we are about to see presently another indication of his manner of thinking and judging.

128. An English merchant vessel, returning from Turkey, had some Turkish merchants on board. Being met by a Tuscan ship of war, which was cruising against the Turks, the latter made her a signal by two cannon-shots, to haul down her colours, which the English refused to do; on the contrary; attacked the Tuscan, but was vanquished, taken and declared good prize, both vessel and lading. The decisive reason with the judges was that the English had resisted and made the attack. But they demanded restitution and a just satisfaction. Gentilis defends the cause of the English by these arguments: that the Tuscans intended to visit the vessel, and thus to disturb her trade and navigation, and that, as a huntsman commits injustice when he enters another's territory, against the owner's prohibition, and as it was not lawful to make war on an enemy in a foreign country, so the Tuscans had no right to attack their enemies, the Turks, being in an English vessel, and consequently in a foreign territory; for which reason the English had justly protected the Turks in their vessel, inasmuch as an injury done to any one in our house is done to ourselves, and the vessel being English, and built in England, should be deemed a house, in which those received in it ought to be safe. Hence he decided, that the Tuscans were bound to restore to the English all that they had taken from them, with costs and charges, to the last farthing. This decision is, without doubt, very just, according to the universal law of nations, but not according to that of Europe; for the latter

then allowed the carrying off enemies' persons and goods from neutral vessels, which the English themselves did every time that the occasion presented itself. *Alberic. Gentilis Advocat. Hispan. lib. 1. cap. 27. coll. 25.*

129. It was then the practice to visit neutral vessels, under pretext of enemies' goods or contraband. But the king of France, Henry IV, who, after having concluded the peace of Vervins with Spain, in 1598, had become neutral, being solicited by the queen of England, who continued the war, to permit French vessels going to Spain to be searched, in order to prevent their clandestinely carrying warlike munitions, refused it, because, said he, that would give occasion to robbery. The laws in France, at that time, were equitable enough. They permitted, it is true, the taking warlike munitions found on board neutral vessels, and retaining them; but it was also enjoined to pay their value: which serves to prove that the right of belligerents to visit neutral vessels was not so universally recognised in Europe, and that though they endeavoured to deprive enemies of warlike munitions, yet they were not taken from friends without paying for them. *Vid. Grot. lib. 3. c. 1. s. 5. n. 4. e.*

130. John III, king of Sweden, being at war with Russia, thought fit to forbid foreign nations from intercourse with the port of Narva, because the Russians received there a great many convoys and succours. In order to obtain the voluntary consent, by negotiation, of the commercial states to this interdict, he despatched in 1579 envoys to Lubec, Hamburg, Brussels, to the duke of Alba, then Spanish governor of the Low Countries, to Holland and the court of France. But these negotiations were for the most part ineffectual. The king, nevertheless, had all the foreign merchant vessels seized in the Baltic sea, which would not submit to his interdict. The Dutch made reprisals, by seizing some Swedish vessels in their ports. As the king had also demanded of the imperial court that navigation to Narva should be prohibited to those of Lubec and the other German Hanse towns, the emperor

had this answer given, in 1577, to the Swedish envoy, that navigation in the Baltic and German sea, as a royalty of the holy empire, was free and open to all the world, and that the commerce of the towns on the Baltic was already, in order to gratify the king, restrained by a convention of 1570, to merchandise notoriously free and harmless, they trusted that the king would stop with that, and that he would not only not molest the said towns in their commerce, but that he would moreover restore to them their effects which had been seized.

131. In like manner Charles IX, king of Sweden, in the war which he made against Poland in 1610, had interdicted all commerce to Riga (which was then under the dominion of Poland) and in Courland, on pain of confiscation of the vessels and goods. The Danes suffered by this, as well as others; and a rupture soon following (1611) between Denmark and Sweden, the Danish king, Christian IV, in his declaration, alleged also as a cause of the war, the damage done, on the part of Sweden, to the navigators in the Baltic sea, and to vessels going to Riga and into Courland. Nevertheless this same king, in this war, had all commerce with Sweden interdicted, particularly to the Lubeckers and to the other Hanse towns, whose vessels were consequently seized. On the complaints made by the latter, the king, in order to justify these acts of violence, made a pretext that they had been advertised by notifications and by printed letters patent. But the emperor Matthias thereupon wrote to the king that these interdicts and advertisements were entirely contrary to natural liberty, to the law of nations, and to the usages of the neighbouring christian princes, and that, excepting munitions of war, which the Lubeckers had already offered not to carry to Sweden, commerce with that kingdom ought to remain free to them. Thus such general interdicts of commerce have always met with contradictions. The cases cited prove this, but they prove, at the same time, that princes have paid very little regard to what is just or unjust, where their interests were concerned.

We shall soon see similar transgressions of the laws and of justice.

132. The state of the United Low Countries is founded on commerce, and without commerce it could not subsist. Although the Hollanders and Zealanders made war with Spain in 1572, nevertheless, almost as soon as it was begun, they permitted the transportation of merchandise from their provinces to enemies' places, on condition of paying for them a certain duty called *license*. The navigation into Spain, and also into Portugal, after this kingdom fell under the Spanish dominion, continued in the midst of arms and hostilities. Philip II connived at this, because both parties found their account in it. But after his death, his son and successor, Philip III, took other measures in 1598. The riches which commerce, and particularly that of Spain, accumulated in the United Provinces, enabled them to meet the expenses of war. The court of Spain thought, therefore, that, by depriving them of the means of war, they should put an end to the war itself. All the Dutch and Zealand seamen were sought for in Spain, some of them executed, and others condemned to the prisons and galleys. Commerce with the United Provinces was, in like manner, prohibited in the Spanish Low Countries. This proceeding, which deprived many men there of their subsistence moved the states, in 1599, to the resolution of equipping a numerous fleet, to attack Spain and the Spanish possessions. To this end they interdicted commerce with Spain, not only to the inhabitants of the United Provinces, but also to all other nations, threatening to treat them as enemies, for being the friends of enemies. The ordinance was printed and sent to foreign courts. The king of France gave his subjects notice, that if they traded, during the first six months, with the Spaniards, it would be at their own risk. Other princes did not declare themselves upon it. But the king of Denmark roundly refused to have the ordinance published, although the states solicited him to it by an embassy. He therein did nothing unjust. Consenting to the prayer was

an effect of complaisance, and not of duty. [44, 46.] In truth, it was a very strange pretension in those, who, having for so long a time traded with the Spaniards, while their enemies, now that such a thing was not permitted to them, wished to force others to trade no more with them as their friends.

133. The English found nothing in this to censure, being then themselves at war with Spain. Several years after, when Charles I. made an alliance with the United Provinces against Spain in 1625, it was therein agreed that all contraband goods, such as provisions and munitions of war, vessels, arms, sails, cordage, gold, silver, copper, iron, lead and the like, from what ever part carrying into Spain, and to other countries in obedience to the king of Spain and his adherents, should be good prize, together with the vessels and men they should carry; that the king of England should exert himself with the other kings, princes, states, cities and neutral communities to forbid their subjects to trade, as long as the present war lasted with the kingdoms and other possessions of the king of Spain and his adherents, and if he should not obtain this by their good will, that vessels found at sea, suspected of being bound for Spain, the islands or other states of the king of Spain and his adherents, should be compelled to stop, in order to be examined, without, however, power for this to retard or damage them, and that business or commerce should notwithstanding be open and permitted every where else to the kingdoms, cities, lands and countries of the allies and neutral princes and friends, without interruption or disturbance. But little regard was paid in France to this commercial interdict, which was, in truth, too extensive, and on that account very unjust. The English therefore seized French merchant vessels, going to or returning from Spain: in revenge for which the French arrested, in their own ports, some English merchant vessels, and declared them confiscable. This was, among others, the cause, or rather the pretext of a war between France and England, in 1627, although the duke of

Buckingham, principal minister and favourite of Charles I, was, through other very strange motives, the true author of it.

134. Some time after (1652), the republic of England having made war on the United Provinces of the Low Countries, the States General prohibited, not only to the inhabitants of their provinces, all commerce with England, Scotland and Ireland, and with all ports, cities or places under the dominion of the British government, but they also apprized all their allies, friends and neutrals, and generally all people and nations, requiring them, during the present differences, not to take or transport out of any countries, kingdoms, places or cities, directly or indirectly, into any havens, places or towns of England, Scotland or Ireland, any munitions of war, or other things serving for the equipment of vessels. In consequence of this interdict all the foreign and neutral vessels were visited and seized by the Dutch, sometimes pillaged, and the seamen treated inhumanly. These things occurring to Swedish vessels, queen Christine made complaints to the States General, and demanded the abrogation of this rigorous interdiction, which was so prejudicial to the commerce of Sweden. It was also urged as a matter of reproach against them, that Dutch merchants carried prohibited goods into England, whenever occasion presented for it. But these representations not producing any effect, the queen took the resolution to have recourse to reprisals, and to unite herself more closely with England. This is a new proof that ordinances of this kind have not always been respected by neutral powers. *Puffendorf Comment. lib. 25. s. 39, &c.*

135. But since that time the States General of the United Provinces have adopted more moderate sentiments with regard to the commerce of friendly or neutral nations, in time of war. For in their declaration of war against France in 1689, they interdict only the transportation of arms and munitions of war, not deeming it just to give a greater latitude to their interdict, which appears by the negotiations on the treaty of alliance they made with William III, king of Eng-

land. The English plenipotentiaries proposed to seize, during the war, and without distinction, all foreign vessels trading to the ports of France, and to declare them good prize. The plenipotentiaries of the states represented that such a proceeding would irritate the Swedes and other people extremely, who took no part in the war, and that it was moreover contrary to treaties made with some of those people. Nevertheless the English persisted in their principle of treating friend and enemy on the same footing. The ministers of the States warmly opposed this article, and particularly one of them, Nicholas Witsen, burgomaster of Amsterdam, and celebrated for some writings he had published, for a long time refused to sign the treaty: but king William pressed him so, that he was obliged at last to yield, although that prince knew very well himself that it was unjust to proceed with such rigour against neutral vessels. It must be so, said he, it is the canon law. It was in this manner that this most unjust treaty was concluded. Respecting the commerce of neutral nations, it was agreed in this treaty that if, during this war, the subjects of any other king, prince or state should trade or carry on any commerce with the subjects of his most christian majesty, or if their ships or vessels should be met making sail for the ports, havens or roads under obedience to his said most christian majesty, under an apparent suspicion of intending to trade with his subjects, and if the vessels belonging to the subjects of any other king, prince or state should be found, in whatsoever place it might be, laden with merchandise or commodities for France, or for the subjects of his most christian majesty, they should be taken and seized by the captains of the ships of war, cruisers, or other subjects of the king of Great Britain and the States, and should be considered good prize. The parties to this treaty further agreed to give the earliest notice of this compact to all kings, princes and states of Europe, not at war with France, that they might be at the same time informed that, if the ships or vessels of their subjects, which sailed before this notification, should be found

making sail towards the ports, havens or roads, in obedience to the said most christian king, they would be obliged by the ships of the king of Great Britain and the states instantly to change their course, and that if the ships and vessels of the said kings, princes or states, or of their subjects, should be met making sail from the said ports, laden with merchandise or commodities of France, the said ships and vessels would be obliged to return into the said ports, and there to leave the said merchandise, under penalty of confiscation: and that in case the ships or vessels of the said kings, princes or states, or of their subjects, which should proceed to sea after notification, should be found making sail towards the ports, havens or roads in obedience to the said most christian king, or from his ports, they should be seized and confiscated, with their merchandise and commodities, as good prize. In a separate article it is also added, that in case either party shall happen to be incommoded or annoyed by reason of the execution of this treaty, the king of Great Britain and the States promise and bind each other to a reciprocal guarantee in this respect. The motives to this treaty are thus expressed in the preamble, that it is important to the king and States General to do as much harm as possible to the common enemy, in order to reduce him to a just and reasonable peace, and to conditions which may re-establish the repose and tranquillity of Christendom; for which purpose it would be necessary to employ all their forces, and especially that they so continue it as that all commerce and trade with the subjects of the most christian king be effectually broken up and interdicted, in order to deprive the said king and his subjects of the means of providing for a war which might otherwise, by its duration, be very injurious, and cause a great effusion of christian blood. *Dumont, tom. 7. p. 2. p. 13, 238.*

136. This treaty which declared vessels and merchandises confiscable without distinction, whether the latter were contraband or not, is too remarkable not to be mentioned. At the first glance it would seem as if the contracting parties

had been the sovereigns of Europe, inasmuch as they gave out a general ordinance without regard to the consent of the princes or states who might be interested in it. It was a good deal to undertake an affair of such consequence in the face of all Europe, and to proceed as they did immediately at the commencement of the war, in the execution of their treaty. Some Hamburg vessels and of other German towns, which before the declaration of war on the part of the emperor, as ally of England and the United Provinces, had gone to France, were taken on their return to England, where the question was agitated whether they ought to be declared confiscable or not. The ambassadors of the States General who had not consented voluntarily to the treaty, having been forced to it by the king's authority, were of opinion that the vessels should be released. But the English ministers and the king also were of a different opinion. They were declared good prize because the king would have it so. On the other hand some Swedish and Danish vessels in the same situation were declared free, and nothing more was done than to take enemies' effects from them. The Hamburgers were wrong therefore because they were without protection, the Danes and Swedes were right because their kings were able to protect them.

137. Moreover these two kings soon showed that in spite of the said treaty they were determined to maintain the freedom of their subjects' commerce, and not to receive laws thereupon from any other. The king of Sweden retained the twelve ships of war which in the treaty of alliance made with the States General he had promised to send to their succour: the king of Denmark had several Dutch vessels seized in the Sound because some of his subjects sailing toward France had been taken and sent into Zealand. The two kings on the 10th March 1691 concluded an alliance for the defence of the free navigation of their subjects, wherein it was agreed, among other things, to recur to reprisals against the belligerents: from which followed a transaction between the

king of Denmark on the one part, and the king of England and the States General of the United Provinces on the other, allowing the Danes to trade with the French under some restrictions. But the violences, or as was said, the piracies against the Swedish and Danish vessels continuing, notwithstanding all the representations made thereupon to the belligerents, the kings of Sweden and Denmark, conformably to a new treaty between them on the 17th March 1693 resolved to demand once more of the powers engaged in "war full and just satisfaction for their subjects, at the same time to urge that like outrages should cease for the future, and moreover to give them to understand that they would no longer suffer the molestation of their subjects' traffic under divers pretexts contrary to treaties and to neutrality, and that they should erect themselves into judges of causes which it did not belong to them to decide upon. If this requisition should not be promptly followed by full satisfaction the two kings bound each other to have stopped and seized, each one in his own jurisdiction, for indemnifying his subjects, as many of the vessels of the nation from which satisfaction was demanded as would be sufficient to supply the damages, and not to release any of them till they should both have obtained the satisfaction required, and in all events to proceed to further expedients." Shortly afterwards on the 25th November 1693 the States General made a convention with the king of Sweden by which they restored some vessels or promised to pay their value. The differences with Denmark however continued by reciprocal seizures of several vessels, and would have become greater if the emperor, the king of Sweden and the elector of Brandenburg had not restored affairs to an accord by their mediation. So many quarrels and disturbances from this unjust general interdict of commerce.

138. In the commencement of the Spanish succession war in 1701 Frederick IV, king of Denmark, entering into a defensive alliance with England and the United Provinces expressly stipulated freedom of commerce for his subjects during

that war. Nor did the two latter powers curtail the commerce of foreigners and neutrals in the same manner that they had done in the preceding war. Perhaps they were restrained by the inconvenience and quarrels which were the consequences of their interdict. It seems also that in the beginning of the new war in 1702 they did not forbid their own subjects from trading with the enemy. At least the States General did not publish such an interdict till a year afterwards, 1703, and that principally at the reiterated instances of their allies, the emperor and the queen of England, who then ordered their subjects to refrain from commerce with France and Spain. With regard to contraband goods, among which were also comprehended cordage, sails and other naval munitions, the States, in their notifications, prayed the neutral princes to prevent the transportation of them to the ports of France and Spain. They above all forbade their subjects, the same being likewise done in England, the business of exchange with France and Spain; which was deemed necessary because the French armies in Italy, in Germany and in the Low Countries were paid by means of bills of exchange of the English and Dutch bankers. This prohibition met with difficulties from the Dutch bankers who alleged that in the former war the business of exchange had not been interdicted. [Lambert's *Memoires pour l'hist. du 18. siecle*, tom. 2. p. 306 et suiv.] Was it not therefore great injustice on the part of the belligerents to forbid foreigners from trading with enemies while their own subjects carried on by connivance so large a share of it? In fact this was no more than a common practice with the Dutch, who, from the foundation of their republic, have always kept up trade with their enemies; and it was even permitted to those who paid a certain duty on it. [132.] This usage has been since often abrogated, and yet always retained, because it united public with private interest. They carried arms and munitions of war to the Spaniards when they were most exasperated against them in defence of their liberty, and by these means some-

times defeated the enterprises of their own armies. The prince of Orange, Frederick Henry, intending to besiege Antwerp in 1638, was advertised that there were four pinks at Amsterdam laden with powder, muskets and pikes. The merchant who had freighted them, did not deny it, declaring that if it were necessary to pass through hell in order to carry on his trade he would run the risk of burning his wings. [Lettre du C. D'Estrades du 29. Avr. 1638 dans ces lettres et Negociat. tom. 1. p. 28. Edit. de 1743.] To people brought up in these sentiments commercial interdicts could not be a great burthen, nor were they in the Spanish succession war. Twenty-one vessels of Amsterdam and Rotterdam returning from France, in 1705, loaded with wine, were stopped by the English. The States demanded their release, alleging as a reason that the republic subsisted only by commerce, without which they could not provide for the expenses of war, and that neither the English nor Scots, any more than they, refrained from commerce with France, but that both of them traded there openly. Whereupon the vessels taken were released, and the two nations being herein equally culpable, it seems that on both sides they permitted by connivance a free trade with France as well as Spain. In this situation of affairs it was very unbecoming to attempt to interdict neutral nations from commerce with the enemy.

139. There were therefore no controversies, or very few, concerning commerce, between the belligerent parties and neutral states, during the Spanish succession war, but many more in that of the north which began towards the end of the 18th century (1700) between Sweden, Poland and Russia, and in which the king of Denmark was involved afterwards (1709.) The inhabitants of the United Provinces carried on a great trade in the Baltic in those countries whose sovereigns were enemies of Sweden. Their merchant vessels and even those of England were stopped and taken by Swedish cruisers, under pretext of being laden with enemies' goods or contraband. They were treated in the same manner that they had treated

neutrals, during the war which was terminated by the treaty of Ryswick, which, however, they deemed crying injustice when they themselves were the sufferers. Their complaints on the subject to the Swedish regency remained without effect. King Charles XII. declared, on the contrary, in 1715, by a new ordinance, all vessels good prize destined to trade with countries taken from him by the Russians; to wit, Livonia, Esthonia and Ingremmania: which determined the king of Great Britain and the States General of the United Provinces to send a fleet of thirty-two sail of ships of war into the Baltic, for the protection of their commerce there. Nevertheless these disputes appear to have lasted for a longer time, and even to the end of the war.

140. In the meanwhile, however, the navigation of Sweden was subject to the same inconveniences, and disturbed on another side. A Dutch vessel, returning from Stockholm, in 1712, had seventeen Turks on board as passengers. In the Copenhagen roads the Danes searched her, and took off the Turks, although they had passports from the ministers of Great Britain and the States General at the court of Sweden. The secretary of the envoy of the States at Copenhagen complained of this to the royal council, and alleged that it was a free ship of the States, who were in amity with the Ottoman porte, with whom the crown of Denmark also was not in a state of hostility. Answer was made to the secretary that these Turks had deserted at St. Petersburg, and that it was intended thereupon to await the instructions of the czar, as the ally of Denmark: to which answer another reason was likewise added, that the Turks, being common enemies of christians, opportunity would thus be afforded for liberating some christian from slavery. They were surprised, they said to the secretary, that he would interfere for such rabble. But he had complained only of the affront done to a vessel of his sovereign; and the affair was regarded in Holland as very irregular, and represented at the deliberation of the States, whose reflections it merited the more, because their subjects

traded to the Levant, and the Turks might take as many men from their vessels as would serve for reclamation for the seventeen Mussulmans seized at Copenhagen.

141. A new war between Sweden and Russia in 1741 became as prejudicial to the trade of the Dutch as the previous one. In the ordinance published by the court of Sweden for Swedish cruisers, it had comprehended in the number of contraband goods, cordage, sail-cloth, tent-canvas, provisions and food, which was contrary to common use, and contrary, indeed, to the treaties made with the States. This ordinance, therefore, subjected to confiscation many effects and goods theretofore free. Wherefore the States, in order to protect the commerce of their subjects, sent, in 1742, 3, a squadron of vessels of war into the Baltic, which gave great uneasiness to the court of Sweden. But peace being soon restored, put an end to these armaments.

142. But already for some time before this war in the north, another had been kindled between Spain and Great Britain, on a dispute which was interesting also to the United Provinces. Direct navigation and trade with the Spanish establishments in America had been interdicted to all foreigners, both by the laws of Spain, and by treaties made with some other states. Notwithstanding these prohibitions, rapacious merchants in the English and Dutch colonies carried on a clandestine commerce there, which was very profitable to them. To put a stop to this, the court of Spain stationed certain vessels of war, called *garda costas*, on their American coasts. But they abused the power given to them, by visiting English and Dutch vessels on the high seas, and even pillaging or seizing them, under pretext of clandestine commerce. After many unavailing representations and complaints, the English proceeded to reprisals, and finally to war. The States General, who obtained during these irregularities some satisfaction from Spain, remained neutral. The principal motive to this resolution was the great profit which they promised themselves from the commerce of Spain. But, instead of profit,

the Dutch merchants had immense losses to sustain, the English seizing a great number of their vessels, on pretence of their being laden with Spanish or contraband goods, and even declaring to be good prize vessels laden with the latter, although this proceeding was diametrically opposed to the commercial treaties made between England and the States, and particularly that of 1674, which was still in force. In answer to complaints often reiterated, the English ministers gave it to be understood that the laws of the kingdom, which authorized such proceedings, had a preference over treaties. Thus the grievances continued while the war lasted, at the end of which the Dutch merchants stated an account of damages amounting to eighteen millions of florins.

143. To this war between the Spaniards and English succeeded a new one between France and Great Britain, occasioned by the disputes concerning the Austrian succession, which produced between Great Britain and the neutral powers new controversies respecting commerce. The most remarkable was that with Prussia, because the two parties, in vindication of their respective pretensions, published writings, wherein some controverted points in this part of the law of nations are discussed: for which reason I deem it proper to give an account of what is most essential in this dispute and in these writings.

144. At the commencement of the war between France and Great Britain, in 1744, the king of Prussia, through his minister, resident at the court of Great Britain, demanded of the British court what it was that was properly regarded as contraband, and whether under this denomination were comprehended grain, wood, timber, copper, sail-cloth, linseed and the like, in order that he might instruct his subjects how to conduct themselves in their commerce. The answer of lord Carteret, then secretary of state, in its essential parts, was as follows: "that none but vessels were excepted carrying war-like munitions to the enemies of the English nation." To a repeated demand he made answer, "that they declared free

goods, wood and other materials for the building of ships, cordage, sails, tar (*semences de lin*), &c." He added "that Prussian subjects would not be hindered in their commerce, unless carrying warlike munitions, specified in all commercial treaties, to enemies of the English nation, nor provisions to besieged or blockaded places: that in other respects the freedom of commerce, with regard to neutral powers, would remain on the same footing as in time of peace." Notwithstanding these positive declarations of a British minister, confirmed some time afterwards, 1747, in some manner, by another, the earl of Chesterfield, also secretary of state, the English cruisers had taken eighteen Prussian vessels, and thirty-three others, Danes, Swedes, Dutch and Hamburgers, all neutral, which were freighted, in whole or part, by Prussian subjects. These vessels were stopped at sea, and taken into England, where some of them were detained two, three, four, as much as ten months, and even more than a year, and after being finally released, costs and expenses decreed to the captors, by which proceeding, as well as the confiscation of the merchandise found on board of some of them (two cargoes of wood, and one of rye), on pretext that they were either contraband or enemies' property, or at the risk of an enemy owner, the Prussian subjects had suffered very considerable damage, besides which some of the vessels had been pillaged by the cruisers, and the seamen horribly beaten. This proceeding, they said, was contrary to natural law and that of nations, agreeably to which navigation and maritime commerce remained free to all nations. Nothing more, therefore, was allowable for the English cruisers than to demand of the vessels they met, destined for France or Spain, whether they had contraband goods, for which points the exhibition of the sea-letters and bills of lading would suffice, nor was it at all necessary to examine the vessel, or to send her into an English port. It being permitted to Prussian subjects to trade to Spain and France, and commerce being usually carried on by purchase, or by exchange or commission, all of which should

be allowed to them. According to the universal law of nations, a belligerent not being at liberty to attack his enemy in a neutral place, nor to seize his goods there, and the Prussian ships being such a neutral place, the English cruisers could not seize on them or any of their effects, it being the same thing to take them from a neutral country as from a neutral vessel: which was likewise established by the treaties between England and the United Provinces, agreeably to which free ships made free goods. The king of Prussia, therefore, demanded a suitable satisfaction for his subjects, injured by so unjust a proceeding, declaring, at the same time, that he would not stop to inquire whether the French merchants had sent the things en commission to neutral places, nor whether they were laden at their risk. And as to these complaints, answer had always been made in England that these kinds of affairs belonged to the courts of admiralty, who would decide them according to the laws of the country, and that neither the king nor his ministers could make the least change in them; it was thereupon remarked, that the English regency had no right to take to itself jurisdiction over a neutral sovereign, or his subjects, nor over their vessels, in a place not subject to the crown, and where the Prussians had as much right as the English: that two powers being in dispute, the laws of the country could not be alleged on either side, because the one was not subject to them, but that both should treat through their respective courts, and terminate the affair by common consent, according to the law of nations, or means thereon founded; that the king of Prussia was not obliged to acknowledge the incompetent tribunals of England, nor to subject himself to their decisions; that as, notwithstanding all his protestations, they continually referred him to the tribunals and laws of England, he had, in consideration of his equal rights with those of Great Britain, established a commission for examining judicially, according to the universal law of nations, the grievances of his subjects, and for forming a just liquidation of their demands. These, with interest up to the 10th of July, 1752, amounting to 194,725

crowns, the king, at the instance of his subjects, attached the capital, which, by reason of Silesia, he was bound to pay certain English individuals, in order thereby to indemnify his subjects for their losses. [This is the contents of a writing, published by the court of Prussia, under the title of an Exposition of the Motives founded on the universally received Law of Nations, which had determined the king, at the reiterated instances of his subjects, to attach the capital which his majesty had promised to reimburse the subjects of Great Britain by virtue of the treaties of peace of Breslau and Dresden, and to obtain for his subjects from the said capital indemnity for the losses they had suffered by the depredations and violence of English cruisers exercised upon them on the high seas. At Berlin 1752-4.]

145. The king of Great Britain referred the grievances and demands of the court of Prussia to a consultation of four of the first English lawyers, whose opinion was afterwards communicated in a letter from the duke of Newcastle, then secretary of state, to Mr. Michell, secretary of legation to his Prussian majesty by way of answer to the exposition of motives before cited. According to the opinion of these lawyers the declaration given by the British ministers to the Prussian amounted to nothing. Vessels of war and cruisers, say they, cannot abstain from making captures by virtue of lord Carteret's verbal declarations, inasmuch as they never had nor could have any knowledge of them. The verbal declarations of a minister made in conversation may indeed make known what he himself thinks contraband according to the law of nations, but never can be extended as having the force of a treaty made to derogate from the said law of nations. The English lawyers do not deny that the Prussian vessels and other neutral vessels freighted by Prussian subjects, had been stopped at sea, examined, sent into English ports, and detained for a long time; that the goods of some of them had moreover been confiscated as contraband (ship-timber) or enemies' property, and that some of these vessels,

which were liberated, had been condemned to pay expenses; that nevertheless that was done justly because a vessel and cargo whose proofs of property are not on board at the time of seizure, should not only bear her own charges, but likewise according to circumstances pay the cruiser those he has incurred [94.] which was the case with many of the Prussian vessels. Some of them, it was remarked, had been restored by the cruisers themselves, and the Prussian subjects so fully satisfied, that they had not complained to any English tribunal. The lawyers do not acknowledge the freedom of the sea and navigation alleged on the part of Prussia, but contend on the other hand that the law of nations permitted belligerents to take the goods of an enemy from a neutral vessel, and they cite in proof the Italian book called *Il Consolato del Mare*, and the opinions of Grotius, Voetius, Loccenius, and others, as well as the treaties made by England in 1661 with Sweden and in 1669 with Denmark. They therefore pronounced the principle that free ships make free goods, for which the Prussians had contended, false and inadmissible. On the contrary they pretend that the power to take enemies' goods from neutral vessels is the indubitable law of nations and the rule which nothing proved better or more forcibly than the exceptions to it in several treaties of commerce, of which they cited two concluded by England with France, two between her and the United Provinces and between her and Portugal, and one of France with the United Provinces. To the objection that England could take to herself no jurisdiction over the subjects and vessels of a neutral sovereign, on the high seas, as a place where the English and the Prussians had equal rights, these lawyers answered that according to the law of nations the only tribunal competent for these judgments was the tribunal of the captor's sovereign; that in England they did not proceed in these affairs according to the laws of England, but according to the law of nations conformably with which the master of the vessel and the owners were bound to prove their property, that in case the sentence of

the admiralty court was deemed unjust or erroneous, an appeal might be taken to a superior tribunal, and that if that was not done, the parties thereby recognised the justice of the sentence. Here the English lawyers pronounce great eulogiums on the impartial administration of justice in their admiralty courts, since, say they, the Prussian subjects on the occasion of their vessels that were seized, had not entered an appeal but in one single case, and that consequently they were well convinced in their consciences of the justice of the original sentence. They add that this mode of judicial proceeding in affairs of this sort was indicated, confirmed and authorized by a great number of treaties, fifteen of which they cite, that any other method would be manifestly unjust, absurd and impracticable, and that thus the Prussian subjects who had claims against any inhabitant of England could not address themselves for that to the king their master but to the English tribunals. Finally these lawyers declared the attachment laid by way of reprisal on the money hypothecated in Silesia to be unjust. It is beyond dispute, say they, that the refusal to pay this debt would be a manifest infraction of his Prussian majesty's engagements, and a positive renunciation on his part of the treaties in which the payment had been promised.

146. The court of Prussia had a reply published in which they complained of the refusal to recognise the validity of the verbal declaration first given by the English minister, although it was not dared to disavow it, which was, say they, a very unbecoming evasion. The great injustice done to the Prussian subjects by the confiscation of their unprohibited goods (timber, rye) and effects belonging to French merchants, by the long detention of their vessels, and their unreasonable condemnation to expenses, were again dwelt upon. It was remarked that the cruisers, after having taken what they liked from the Prussian vessels restored by themselves, had indeed released them, not finding any thing objectionable in their documents, but after a detention of near two months

that the masters of these vessels after such losses, had naturally preferred returning to sea and pursuing their voyage than to prosecute the cruisers, and plead against them not without enormous expenses, and that it was through such motives that the Prussian subjects had not appealed from the unjust sentences of the English admiralty courts, which, in almost every case, even of the most manifest injury on the part of the cruiser, had discharged him from all costs, and placed them to the account of the owner of the vessel unjustly taken. They insisted, as before, that the principle, according to which free ships make free goods was the rule of the law of nations, to which the usage was diametrically repugnant of casting the proof of their property upon the master of the vessel and the owners of the goods, which was evidently an injustice. Many cases were mentioned, wherein the English admiralty courts had pronounced sentences altogether arbitrary and partial, adjudging goods to be contraband and confiscable, which were notoriously not so (timber, rye) and countenancing the cruisers, to whom costs of suit and others had been awarded notwithstanding the openly unjust seizure of their vessels. Finally it was shown that foreigners were not so absolutely bound to carry their complaints before foreign courts of admiralty but that they might carry them, above all when, as in the present case, they had suffered great damages and injuries, before their sovereign, who had a perfect right to have the cause examined, and if it appeared just, to demand satisfaction for it. To the complaints concerning the seizure of the sums due to certain Englishmen, hypothecated in Silesia, a similar case was offered to the English court, wherein the same proceeding had been observed towards the United Provinces by England, which the king of Prussia now pursued towards her. It would be too diffuse a work to say any thing more of this famous quarrel. I will add only that the affair remained in this way for several years between Great Britain and Prussia, and that the dispute was finally terminated by the treaty of alliance concluded between the

two courts in 1756, by virtue whereof, for indemnifying the Prussian subjects, twenty thousand pounds sterling were allowed, which the king of Prussia caused to be distributed among them.

147. The writings published on both sides in this affair furnish a very remarkable example of a dispute, where the parties were not agreed, nor could become so, on the principle according to which a decision was to be made on the justice or injustice of the seizure of their vessels. Each of them alleged, in his own favour, the law of nations. The Prussian writers most frequently call it universal and natural, the English name it simply law of nations, without deciding whether they understand by this name the universal law of nations or the particular law of Europe, although it would seem as if they spoke of the latter only. The Prussians defend, with respect to neutral vessels, the principle that free ships make free goods, which agrees with the universal law of nations. [48.] And the new European law of nations has adopted it, but with this addition, that goods on board enemy vessels are confiscable, together with the vessels; which principle is likewise recognised by the Prussians. They maintain, therefore, according to the universal law of nations and that of Europe, that the cargo of their vessels, as neutrals, should be free, though it be enemy property, and in return they acknowledge that their effects on board enemy vessels are confiscable. The English lawyers absolutely deny the principle that free ships make free goods, as founded on the law of nations. They assert, on the contrary, that it is established only in some treaties (of which they recite five), as an exception to a general rule, according to which enemy goods, found on board a friendly vessel, are confiscable. This, say they, is the law of nations, and to prove it they refer to the *Consolato del Mare*, to the authority of Grotius and other sages, and finally to two commercial treaties, made between the English crown and those of Denmark and Sweden. Thus the two parties are in open contradiction. Let us now see which of the two oppo-

site assertions is the more conformable to justice and truth. The first proof displayed by the English lawyers in their defence is the *Consolato del Mare*. But this book has never been a law for the nations of Europe; for, however the regulation contained in it may have been adopted in remote times, that enemies' effects might be seized in a friend's ship, it has not been received as a law, because contained in this book, but as a custom insensibly introduced, and by tacit consent, because the people of Europe have established it in their commercial treaties. [92.] This custom was therefore the European law of nations in these affairs. But as a custom may, in like manner, be tacitly abrogated, and a new one substituted for it, such has been the fate of this one, and it was changed for very sufficient reasons. [109, 110.] Since the year 1646, in order to prevent a great many inconveniences which were a necessary consequence of the ancient custom, another rule has been established, according to which free ships make free goods; that is to say, in a neutral vessel enemy goods are free, as in an enemy vessel neutral goods are confiscable. This then is the new European law of nations, which is recognised and received by almost all the states of Europe. The English lawyers are therefore almost a whole century behind hand with their pretended law of nations; for then they might have written and reasoned in the manner they have done. They did not recollect that the ancient custom, and with it the ancient law of nations, has been abrogated. The face of things being thus entirely changed, the *Consolato del Mare* can be of no weight nor authority, and the opinions of Grotius, Loccenius, Voetius, Zoucheus, cannot any more be decisive. For as when they wrote, the ancient rule was yet followed, according to which the goods of an enemy were good prize, in the vessel of a friend, they could not but support it in their writings. The sentiments of these illustrious men, and other sages, would be therefore as little pertinent to prove the law of nations, in this point, as the *Consolato del Mare*. The proof sought for in treaties by the

English lawyers is in truth more relevant; but here these treaties are evidently against them, not for them. They allege only two, which England concluded with Sweden and Denmark, and in which the old rule is established. But on the other hand, in the treaties of commerce made since 1646, and in part by England herself, there are at least thirty wherein the new rule is adopted, that free ships make free goods. [100.] Here there are thirty (without counting those made with the barbarous states) against two, and consequently a very great number against a very small one. The former, therefore, must make the rule, the latter the exception, and so much the more from the former being recent, the latter old; for that very clearly proves the intention entertained by the European states, to abandon, in affairs of this sort, the ancient law of nations, and to introduce a new one. [12.] Of all the new treaties which have been rendered public, not one is to be found in which the ancient rule is retained, unless that is to be referred there which France concluded in 1716 with the Hanse towns, and which contains, in a very irregular manner, one article of the old law of nations, and one other of the new. [104.] Since then, in regard to states, between whom and the belligerents there existed no treaty of commerce, the ancient rule was observed in former times, it follows at present that the new one, whose usage is received every where, must be observed in like manner, which was what the king of Prussia demanded for his subjects; but the British court refusing it, and proceeding against them, according to the ancient rule, this was a subject of very just complaint, because no state has a right to force another to submit to a law which it does not acknowledge.

148. The losses of the Prussian subjects, for which, however, they were in some measure indemnified, was not by a great deal so great as that suffered by the Dutch merchants, in the war which began in 1755 between France and Great Britain. The French, seeing their commerce with their islands in the West Indies in great danger, resolved (which in time of

peace is never done) to carry it on through foreign vessels, and particularly those of the Dutch, who would go in quest of the merchandise at the islands, and carry it either to the ports of the United Provinces or to those of France. But the English soon disturbed this navigation, because, said they, it was carrying on the commerce of France under the name of neutrality, and protecting it against the vessels of war of the English and their cruisers. Being masters of the whole ocean, they seized not only a very great number of the Dutch vessels, returning from the West Indies, or even from the Dutch colonies, and destined for ports of France and Holland, but also those going from ports of France and the United Provinces to the West Indies. They captured also many vessels making sail towards Spain, Portugal and other neutral countries, or returning from them. Several were pillaged at sea by the English cruisers, and the captains and sailors ill-treated. In the two years 1757 and 1758 alone, as many as three hundred Dutch vessels, in the European and American seas, were either pillaged or sent into English ports, where, after a long detention, they were condemned as good prize, part with the cargo, part that alone. Four lists of them were published in Holland. According to the first, containing a hundred vessels, for the most part pillaged, the account of damages amounted to 439,190 florins; according to the three others, among which there was a great many confiscated, and many pillaged: the damages were estimated at more than eleven millions. Upon this the Dutch merchants complained of the great injustice of the English courts of admiralty, above all in America, of their strange and irregular proceedings, of the long detention of their vessels, of their confiscation, and that of most of their free goods, under pretext of French property. Almost all the cities of Holland presented request on request to the States General, to those of Holland, and to the princess governess at that time. They implored the aid of government for the protection of navigation and commerce. Frequent and reiterated remonstrances were made to the British court, as

well by the ordinary envoy of the States, as by an extraordinary embassy. All was in vain: the captures continued as usual. Every day saw Dutch vessels condemned, at one time under one title, at another under another. These proceedings irritated and embittered the people in the United Provinces, particularly in Holland. They began to talk of reprisals. But this was warmly resented in England, and by this menacing declaration, "that in case the province of Holland, or the commercial towns therein situated, for the pretended protection of their commerce, should equip and send to sea from eighteen to twenty-five ships of war (which they had not a right to do, by virtue of their union with the other provinces), these ships would be treated as pirates; and that if the States General equipped a fleet for that purpose, it would be considered a declaration of war." This proceeding seems to have been a little irregular against a free state, which, in making this naval armament, would have done nothing illegitimate; for the carriage of the products of the French islands to the ports of France and the United Provinces was not the only cause of these disputes. There were many others. The violence of the English cruisers and their depredations, the navigation of the Dutch to their own colonies and to neutral countries disturbed, the unjust seizure of their merchant vessels, carrying on only a commerce permitted on the footing of treaties subsisting between the two powers, were sufficient reasons for guarding against such enterprises, and opposing force to force. Yet the Dutch vessels of war destined to protect commerce against these piracies, were to be treated as pirates. The pretended cause that the province of Holland, by virtue of the union of the seven provinces, had not by itself power to send a fleet to sea, was not a valid cause. That was an affair altogether municipal, which, at any rate, Holland might have to settle with the States General, but which was not within the jurisdiction of a third party, no right in the world having given the power to judge of it. But let us consider for a mo-

ment what is most essential in this dispute, and the reasons made use of by the two parties in defence of their cause.

149. The knot most difficult to untie was this: that the Dutch carried on a very profitable trade to the French West India islands, bringing back from them their products to France, as well as carrying French goods to those islands. In this manner the best part of the commerce of France had fallen into the hands of the Dutch, and was carried on in Dutch bottoms. This was what the English considered illegitimate because it was prejudicial to them, the vessels and effects of the French being thus sheltered from attack and pursuit of the English ships of war and cruisers. They therefore cut the knot. They seized all the Dutch vessels employed in this trade, and declared them good prize. On the complaints of the Dutch, and in order to justify this proceeding, they alleged the treaty concluded in 1674, between the crown of England and the United Provinces, according to which "freedom of navigation and commerce in any sort of merchandise ought not to be interrupted by reason of war, but should be extended to all goods which were transported in *time of peace*, contraband alone excepted:" which signified, they said, "that trade might be continued during war in the same manner that it had been in time of peace." Now, continued they, the trade of the Dutch to the French islands has been but quite recently begun, and since the commencement of the war (for in time of peace it was restricted merely to France) and thus it could not be understood in the treaty of 1674. And as the Dutch vessels do not trade but by special permission of the French, they could not be considered but as vessels of that nation which alone has a right to give such permission, that is to say, as French vessels, and consequently they may be seized and condemned. [Answer to the Memorial concerning the capture and detention of Dutch vessels going to and coming from French islands. London, 1758. see the Monthly Review for December 1758. p. 578. vol. 19.] The Dutch alleged the same treaty of 1674 and the principle

therein adopted, that free ships make free goods; agreeably to which French goods laden on board Dutch vessels could not be seized there. As to the liberty of navigating from French ports to French islands, and from them to France, they deemed it proved by the declaration of the same treaty made with a common accord in 1675, because according to that "the vessels of the subjects of either party might not only pass and trade from a neutral port or place to an enemy port or place, but also from one enemy port or place to another enemy port or place, whether the said places belonged to the same prince or to several princes, with whom the other party might be at war." This declaration appears to be favourable to the Dutch and to place the right on their side. But it was too feeble against a nation which ruled the seas. The seizure and confiscation of Dutch vessels continued therefore as they had begun until the end of the war; and the merchant losses amounted at last to an exorbitant sum, which some estimated at one hundred millions.*

* An American court condemns an American vessel to the penalties of prize of war because she has a British license on board in time of war between the United States and Great Britain. The reason of the law is the life of the law; and the reason of this condemnation is, that the American becomes hostile by placing herself under hostile protection. If so, does not the same principle sanction the rule of 56? The English condemned the Dutch vessels because they carried on, by *French permission or license*, a trade not open to them in time of peace. They therefore became identified with the French, being under French protection, said the English. The answer the Dutch made to this argument was that free ships make free goods. But, without the acknowledgment of this principle, does not the rule of 56 appear to be maintained by *the principle*, or reason of our condemnations in the license cases?

The rule of 56, the orders in council for unlimited paper blockades, the most enormous catalogue of contraband, even the maltreatment, though not perhaps the impressment, of seamen, seem to have examples in the practice and even, some of them, in the treaties of all maritime nations. It comes therefore to this—either establish that free ships make free goods, or equip navies. No other alternative remains.

Tr.

150. The revolt of the English colonies in North America was an occasion which France eagerly seized upon to strike a severe blow at the power which had triumphed in the last war; and it was not neglected. Louis XVI, supported the American colonies; he made an alliance with them and acknowledged them as free and independent colonies. This proceeding must necessarily light up the flame of a new war, which could not fail to expose the navigation and commerce of neutral nations to many difficulties and dangers. The court of France caused to be published, 28th July 1778, an ordinance forbidding its cruisers to take or send into French ports neutral vessels, although coming from or going to enemies' ports, excepting only contraband goods which were to be stopped and confiscated. But it reserved to itself the revocation of this liberty in case the adverse party should not make a similar declaration in the term of six months. This ordinance was very rigorous in some articles. It purported, among other things, that a vessel laden with contraband destined for the enemy should be confiscated, with all the cargo, if the contraband goods constituted the one-third part which was contrary to the usage established in almost all commercial treaties: and that the same thing should take place if an enemy agent or officer should be found on board a neutral vessel. It was likewise ordained that only the papers found on board should be received as proofs, and that those brought afterwards should have no credit.*

151. The war began by acts of hostility without any formal declaration. The English cruisers seized not only French vessels, but likewise many neutrals, on pretence of being laden on French account, and took them into English ports. The envoys of Denmark, of Sweden, of Prussia and the United Provinces immediately complained of this. People of moderate sentiments even in England acknowledged that war not having been declared, these vessels could not be seized

* This was rigorous and even unjust, being contrary to general principles of jurisprudence and common usage.

under any colour. Many of them also were restored with costs and damages. Contraband goods, among which were placed ship-timber and other naval munitions, were bought for account of the admiralty, and the freight paid, because, it was said, the freighters of these vessels had not been apprized of the rupture, but for the future that reason would not be available. The king of Great Britain also published an ordinance in which it was gravely forbidden cruisers to attack or stop on any pretext, unless because of naval or warlike munitions, vessels or effects belonging to friendly princes or states or to their subjects, without certain and unequivocal proofs of the falsity of the papers and bills of lading exhibited to them. All this was also to be particularly observed towards vessels of the United Provinces, but in like manner with the exception of warlike and naval munitions. The English cruisers continued therefore to take Dutch vessels laden with materials fit for ship-building and frequently without discrimination sent the vessels into English ports. They were indeed finally released with costs and damages: but with all that the owners did not come off without loss, having lost the opportunity of a profitable sale by long detention. The cities of Amsterdam, Rotterdam and many others in Holland, of West Frizeland and of Frizeland addressed themselves to the states of Holland, to the States General and to the prince stadtholder, demanding their protection for the preservation of free navigation and trade. The States General did not fail to make remonstrances against the outrages of the cruisers through their envoy in London, and to demand redress of the grievances, one of the greatest of which was the neglect of the treaties of commerce subsisting between the two states, many Dutch vessels having been seized, whose cargoes consisted but of ship-timber, contrary to the treaty of 1674, which expressly puts timber and all other materials fit for ship-building and equipment, in the number of permitted goods. It was also remarked that although the timber was paid for, yet that was done only at a price arbitrarily fixed.

152. But it seems that in England they did not choose to govern themselves so scrupulously by this treaty, although conceived in very clear and simple terms. That appeared by a decree of the court of admiralty, on the subject of a Dutch vessel, laden with ship-timber. Both of them being Dutch property, were claimed by virtue of the treaty of 1674. The cruiser maintained that the cargo was French property. By the decree it was ordered that the vessel be restored as Dutch property, the freight paid, the loss of time occasioned by the *improved* (bonifiée) delay, and the cargo sold to the commissioners of the admiralty at a fair price, for the profit of the owner. The judges published the reasons of their decision, which are very remarkable, because they there display anew the distinction between the letter and the spirit, formerly employed by Louis XIV, and then so much ridiculed in England. We should, say they, consider and interpret the spirit as well as the letter of the alleged treaty of 1674, by comparing it with other treaties subsisting between the two states, particularly with those of 1670 and of Breda: that although the articles of pitch, of masts, &c. are specially named among the unprohibited articles by the treaty of 1674, the treaties of an older date purport expressly that neither of the two powers can afford succour to the enemy of the other, by furnishing arms, munitions and vessels; that there is no difference between furnishing vessels of war, completely armed, or sending parts, of which vessels might be soon composed; that otherwise the intention of the treaty might be eluded, if one Dutchman should furnish masts, a second sails, a third cordage, which would destroy the prohibition of succour, concerning which they supposed themselves secured; that the usage or the custom, according to which treaties have been explained, formed, in the second place, a very strong argument; the more so since, in the two preceding wars between France and England, the States General had been bound by the same decisions; that is to say, that they had detained all materials fit for the marine which were found on board Dutch vessels

bound for France, and that the present case was the same; that from all these motives the court had given the said judgment, which imposed no prejudice on the Dutch owner, since he was paid the fair price of his cargo, the freight and the damages, interest caused by the capture and detention.

153. In the United Provinces, however, they did not agree to this new, and besides unusual interpretation: they insisted rather on the letter of the treaty of 1674. In the meanwhile the English cruisers did not discontinue seizing Dutch vessels and sending them into English ports, where they were often declared good prize, or at least their owners subjected to long and expensive trials. In addition to this, the suffering merchants complained that the English cruisers arrogated the right of having the bill of lading shown to them, and even breaking open for it; that sometimes they carried off what they liked, or wanted, and finally took away the crew, forcing them to work on board their vessels. The States General resolved thereupon to have their merchant vessels convoyed by ships of war. - In order to turn them from this, the ambassador of Great Britain represented to them that the apparent irregularity in the conduct of England, with regard to the vessels of neutral powers, navigating towards the ports of France, was occasioned by the necessity of defending herself against an enemy who had always acted by surprise, that the war continuing, and the active enemy overlooking nothing to push it, the king was put under the obligation of taking caution against his dangerous designs, and of looking to his own defence, and that of his kingdoms, that he sincerely desired to respect treaties, inasmuch as they did not directly tend to expose him to imminent danger, and that it was by no means his intention to disturb the accustomed commerce of the Dutch with France, with the exception of naval and warlike munitions, and that with all the equity and even generosity possible. He proposed to treat of the means of regulating, in an amicable manner, what would be proper, for the future, to be done with regard to articles, which, without car-

ing to abandon himself to his enemy's discretion, it was not possible to permit him quietly to receive. For this purpose he offered to negotiate, and flattered himself, he added, that the States would not authorize their subjects to carry naval munitions to France under convoy. The effect of this representation was a declaration of the States General, according to which, vessels laden with those kinds of merchandise, were not to enjoy the protection of ships of war. *Merc. Hist. et Polit.* 1778. Dec. p. 702. et suiv.

154. While these things were going on, the court of France interposed, and caused a representation to be made, on the 7th of December, 1778, to the States General, that the king, in the persuasion that they would conform, under existing circumstances, to the principles of the most absolute neutrality, having included the United Provinces in the regulation, made the preceding month of July, concerning the commerce and navigation of neutrals, he demanded of them a clear and explicit explanation as to their ulterior determination, and that he should decide, according to their answer, to maintain or to annul those regulations in what concerned their subjects: that the king flattered himself the States would obtain for their flag and their commerce all the freedom which was a consequence of their independence, and which the law of nations and treaties assured to them; that the least derogation from these principles would characterize a partiality, the effects of which would carry with them a necessity of putting a stop, not only to the advantages secured to their flag by the regulation in favour of neutrals, but likewise the essential and gratuitous favours enjoyed by the commerce of the United Provinces in the ports of France. The contents of this memorial were soon repeated in another writing, on the 19th of December, communicated to the counsellor pensionary of Holland, wherein it was added, that the freedom of the commerce of the republic and of its flag would become illusory, and should be altered, unless the States maintained it by a suitable protection, and if they consented to deprive their subjects of con-

voys, without which they could not enjoy their rights. A resolution, of whatsoever nature, the effect of which was to withdraw from them their legitimate protection, either in all the branches of their commerce in general, or particularly in those of all kinds of naval provisions, would be regarded, under present circumstances, as an act of partiality derogatory to the principles of an absolute neutrality, and would inevitably carry with it the consequences announced in the preceding memorial.

155. The States General nevertheless having, at the instance of Great Britain, excluded from the protection of convoy, vessels, laden with timber and other materials fit for ship-building, the ambassador of France gave them to understand (January, 1779), by a third memorial, that the king his master was firmly resolved to regard this restriction, which could not become advantageous but to his enemies, as a testimonial of partiality derogatory to the principles of an absolute neutrality. He declared, at the same time, to the States, that if they persisted in refusing to merchants all the protection they solicited, and if they continued to modify their rights in favour of the king's enemies, his majesty was resolved to have instantly published a new regulation, relative to commerce and the navigation of the subjects of the republic: which was already done, and the ambassador sent a copy of it to the States.

156. Many merchants, owners, underwriters and masters of vessels in Holland and the other provinces, especially at Amsterdam, made fresh complaints, from day to day, of the English cruisers; and they proceeded at last to serious deliberations, as well in the assembly of the States General, as in that of the particular states of the Provinces. In the assembly of those of Holland, the city of Amsterdam strongly insisted on an indefinite protection of the merchant vessels of the United Provinces by ships of war, and without distinction as to their lading. But in that of the States General the plurality of voices was for maintaining the anterior resolutions.

Thereupon the king of France immediately published his regulation relative to the vessels of the subjects of the United Provinces, which was already made the 14th January in the council of state. It purported that the republic of the United Provinces not having obtained the freedom of navigation from the court of London, equal to what the king had promised to their flag and which their treaties with England assured to them, he revoked, in regard to the subjects of the republic, the advantages announced by the regulation concerning the commerce and navigation of neutral vessels, and that he moreover subjected the vessels of the United Provinces and their commodities to certain duties of which they had been free, excepting the city of Amsterdam, to whose vessels he preserved the freedom promised by the regulation and the exemption from the new duties, because it had made the most patriotic efforts for the preservation of the unlimited liberty of the flag of the republic. (Both of which advantages were also afterwards granted to the city of Harlem, from the same motive.) On this declaration there soon followed a counter declaration from the court of London, purporting that the vessels of Amsterdam bound for France should be stopped, but that others should not be molested in their course, unless laden with contraband merchandise.

157. These declarations of the two courts did not a little embarrass the States General. That of Great Britain had desired that it would please them to make an exception with regard to the article of the treaty of 1674, by which timber and other materials fit for ship-building and equipment were declared free, and they had in some manner consented to it by the declaration that the vessels of their subjects laden with these kinds of effects should not enjoy protection from convoys. France on the contrary required of the States to insist absolutely on the accomplishment of the said article, and for this purpose to afford convoys to their merchant vessels. On the side of England it was remarked that it was encroaching on the rights of the sovereignty of a free state to which

no foreign power could give laws. And in truth if the affair is considered in itself, and independent of the particular circumstances connected with it, the States were without doubt fully in the right to make the aforesaid exception according to their pleasure. It was an affair in no way concerning a third person, and in which no one had a right to prescribe to them. But the exception having been made in time of war between France and England, to the advantage of the latter and disadvantage of the former, the conjuncture gave occasion to the court of France to make such a demand of the States as in itself appeared to be imperious.

158. The States general drew upon themselves a disagreement with France by their complaisance towards England, and the people of Amsterdam and Harlem, favoured by France, had so many the more vexations to fear from England. Now the Dutch merchants make great movements anew, having lost by the new regulation of the king of France, the advantages and exemptions from certain duties which they enjoyed in their French commerce by a gratuitous concession of the king, though not obliged to it by any treaty. This finally caused the States General to resolve (26th April 1779) to afford convoy without distinction to the merchant vessels of the United Provinces, and for this purpose to arm thirty-two ships of war and frigates. But this resolution was not adopted unanimously, the states of Zealand having refused their consent to convoys for vessels laden with naval munitions, because they deemed such a step too delicate in the actual conjuncture; wherefore it was that the resolution of the States General was not fully put in execution. Anterior to all this the kings of Denmark and Sweden had already resolved to send convey with their merchant vessels in order to protect them against the insults of the cruisers of the belligerents powers, and cause their flag to be respected. Both of them with this view sent a good many ships of war to sea, which was also done by Russia for the same object. Thus a general alacrity appeared to be roused for the defence of the free navigation and

commerce of neutral nations. We must therefore attend to the consequences of these rigorous measures.

SECTION TENTH.

Miscellaneous remarks on the free commerce of the subjects of belligerent powers sometimes permitted, and on the preservation of the rights of neutral states relative to commerce in time of war.

159. The navigation and commerce of maritime belligerent powers are always exposed to imminent danger, the rights of war giving up both their vessels and cargoes a prey to the enemy. But the maritime commerce of neutral people does not find itself in a less precarious and disadvantageous situation, because the ships of war and cruisers of the belligerent parties, under pretext of enemy or contraband goods, stop and seize their vessels on the high seas, which, as we have seen, is attended with the most fatal and destructive consequences to them. Indeed it may be said with truth that the merchant vessels of neutral states have more to fear than those of belligerents, the latter being a prey to the adverse party only, but the former being pursued and taken by both parties.

160. All these inconveniences are the effects of war which the law of nature does not authorize at all and which a manifest injustice has introduced as an usage under the name of the law of nations. War is a necessary evil which can never be banished notwithstanding so many systems and projects made for the establishment of perpetual peace in Christian Europe. Nevertheless it is the duty of people and their sovereigns to diminish the evil as much as possible, and to render it at least more supportable. Thus the gradual softening of morals and more humane and generous sentiments have already introduced a very considerable change. The barbarous warriors of past ages thought themselves permitted to do whatever they had the force to execute. They devastated the countries, sacked and burned the towns, massacred the inhabitants, violated women and virgins, committed, in a word;

all the excesses of which petulance and brutality were capable. Such cruel usages yet prevailed in the German Thirty years' war. This fury for ruining countries and men has since ceased, if not entirely, at least in some measure. The last scene of an inhuman and barbarous devastation was the Palatinate and the adjacent countries, where the French in 1688 and 1689 set all on fire, and thus for a time rendered those beautiful and fertile countries uninhabitable for the human kind. At present the most oppressive burthen of those whom the chance of arms subjects to the power of an enemy, are the contributions and immoderate levies which are imposed on them and exacted with too much rigor. It were much to be wished that these calamities were put a stop to, or at least lessened, by which countries and cities are ruined for many years and reduced to the lowest indigence. That would be an object very worthy the consideration of those princes, who make *their own wars*, and not those of *their people*. If they would reflect that they are for the people and not the people for them, they would find motives for compassion and forbearance for so many millions of innocent individuals, and even an urgent obligation to make them suffer as little as possible. When they conquer a country they ought to content themselves with the acquisition of its domain, the rights and revenues, and leave the subjects in the possession and enjoyment of their property, without disturbing them in the exercise of their profession or their business.

161. With a view to augment the happiness of people and to diminish the misfortune of war it would be very desirable to see the maritime powers, being in war, leave navigation and commerce free among their subjects. Both parties by this would gain infinitely, and especially that whose commerce should be the most extensive and flourishing. For, having more merchant vessels at sea than their enemy, the latter might carry off a number so much the more considerable of them. Experience has proved this in the two great wars terminated by the treaties of peace of Ryswick and of Utrecht.

Even then when the marine of Louis XIV, was already on the decline, little French squadrons, commanded by a Du Bart, Du Gue Trouin, De Pointis, De Forbin, by the capture of an infinite number of their vessels, did immense damage to the English and Dutch, far surpassing what they did to the French. Privateering in general is attended with no other results than the destruction of the commerce of both parties, which is a real loss to both. Though a few individuals may enrich themselves by this sort of enterprise, many merchants, in return, lose their vessels and property, and become bankrupt. Finally, the state itself gains nothing by the most numerous and fortunate captures. It would therefore be very advantageous to both parties to leave the way clear for the commerce of their subjects, even in time of war.

162. These reciprocal advantages, and other considerations of humanity, have sometimes been effectual in procuring permission of free commerce, and the exercise of other professions in the midst of war. With this view Charles V and Francis I made a treaty in their first war (the 5th of October, 1521), in which it is provided, among other things, that frequent depredations and incursions having been made on both sides, on the occasion of this war, by sea and land, to the great and intolerable detriment of innocent subjects, by reason whereof even the fisheries, given by the bounty of God to appease the hunger of the poor, would be put a stop to, it was agreed (for a certain time) to leave the herring fishery, and all sorts of fish free to the subjects of either power. In the war between Louis XIV and the United Provinces, it was in like manner agreed, on the 17th of August, 1675, that fishing on the coast of Holland should be free to the French, and for the Dutch on the coast of France, and for both on those of England and Scotland. *Dumont, tom. 4. p. 1. p. 352. Roussel Suppl. tom. 2. p. 1. p. 352.*

163. The States General of the United Low Countries having declared war in 1675 on the king of Sweden, because of the invasion of the countries of the elector of Branden-

burg, their ally, they nevertheless soon after (November 26th) concluded a treaty with him, by virtue of which navigation and commerce between them should remain as free during the war as they had been before. *Dumont, tom. 7. p. 1. p. 316.*

164. In the midst of the war of France with Spain and the Low Countries there was likewise a convention made (25th of October, 1675), by which it was stipulated that traffic should be free and open from France to Holland, and from Holland to France, on the rivers Meuse, Sambre and others, as also by land in the towns and on the open country of France, Spain and Liege; and this for all lawful merchandise, and all kinds of grain, without excepting any other than contraband. It was in the same manner that, in the war following, begun in 1688, the city of Bayonne and the country of Labourt, of the one part, and the province of Guiposcoa of the other, concluded a treaty, on the 24th of August, 1694, with the consent of the kings of France and Spain, according to which all acts of hostility, by sea and by land, were to cease, and free navigation and trade be permitted to both parties. Similar treaties had been made before between them, in previous wars, in the years 1653 and 1668.

165. In the last wars of Germany, the belligerent parties also promised and gave full security to the commercial cities, in which fairs were held, and to the merchants going thither and returning, both for their persons and their effects and merchandise. Even people whom we call barbarous, the Turks and Persians, have, for their common advantage, stipulated by conventions among themselves, that interior and exterior commerce should be no more hindered during war than in time of peace, and that the caravans might go with perfect safety, both nations being equally interested therein.

166. What has been done in favour of commerce, and for the advantage of men in some cases, may also be done on many occasions, or on all. The subjects of belligerent parties would reap abundant fruits from conduct so worthy of humanity and beneficence. If the fear of spies and traitors

should compel belligerents to abrogate and interdict communication between their countries and their subjects, they might nevertheless allow them free trade with the neutral states. Prohibited goods, indeed, would, in this case, make a great difficulty; for the belligerents not consenting to permit their transportation into enemies' countries, even to neutrals, so much the less would they permit an enemy to go for them to a neutral country. What is to be done then here? Nothing but to forbid it, when it would be the business of ships of war and cruisers to give weight to the prohibition, and to enforce it.

167. But a good or bad policy, I do not decide which, opposes still stronger obstacles to the commerce of maritime belligerent powers. Their wars are most frequently *national* wars. It is the principal aim of both parties, mutually to impoverish and render each other unhappy. Each one, therefore, employs all his force to destroy his adversary's commerce, and establish his own upon its ruins. But such a design is as vain and dangerous as it is inhuman. The evil meditated by one party often recoils upon its author, the accidents of war unexpectedly frustrating the best concerted enterprises. Yet such extravagant and pernicious projects are attempted on every occasion, and substance and life hazarded for their execution. The acrimony of nations, in their own wars, is too violent to allow men to listen to the gentle voice of benevolence and beneficence. According to their sentiment, it is a gain and an advantage to crush their adversary, without regarding the peril, to which they are exposed, of ruining themselves.

168. Nevertheless, if this cannot be otherwise, and if declared enemies will not treat each other but as enemies, they should at least manage differently with their friends, or the neutrals. But in many respects they make no distinction between friends and foes. This is a remnant of the barbarism which prevailed formerly. There was a time when people had no idea of what is just or unjust. Force alone decided

all, and that was deemed a good acquisition which they were so situated as to be able to wrest forcibly from another. These principles gave birth to the piracies of the ancient and the middle age. No order or discipline was to be seen in maritime wars, which were nothing but a general robbery. Whoever had means and courage armed as many vessels as he could against the enemy, and every vessel at sea was treated as an enemy, although not enemy. It was decreed good prize. After people recognised the difference which there is between right and wrong, and between friends and enemies, and after having learned that it was not lawful to pursue and attack the former, rapacity invented a pretext for seizing the vessels of those who were not enemies, and this pretext was the being laden with articles belonging to an enemy. But this proceeding giving occasion to frequent depredations and injurious seizures of a great many effects and commodities, the belligerents found it convenient to institute a judicial examination whether the merchandise found on board the captured vessels was actually enemy property. In the first case it was adjudged to the captor, in the second the vessel and cargo were liberated. After these proceedings, although very much opposed to justice, had obtained the force of custom, princes and people making war at sea thought themselves perfectly in the right to reduce the trade of neutral nations to certain bounds. They forbade their loading or carrying in their vessels effects belonging to the enemy, or to enemy's subjects. This strange and chimerical right to prescribe laws to neutrals for their commerce was afterwards extended still further. The belligerents would not suffer, moreover, that arms and munitions of war should be carried and sold to their enemies by foreign merchants. They had them seized the same as enemies' goods; and what is more, they punished the owners, by the confiscation of the vessel and every thing found on board of it. So violent a proceeding formed an obvious contrast with all the principles of right: but the prejudices of the times and of men gave them validity. The

usurpations of belligerents on the rights of neutral nations and of their sovereigns were reported just and lawful, because long usage had, as it were, sanctioned them. It is therefore no more than the rapacity of ancient warriors, and the errors of past ages, which have given rise to the pretended rights of belligerents against neutral nations.

169. The custom of interdicting neutral merchants from trade in the munitions of war, and, as has been done sometimes before now, and is done now, also in that of materials for ship-building, is, in many respects, very unjust. There are many countries in Europe, as has been remarked before, [32.] where warlike and naval munitions, being the most abundant products, and of the best quality, the inhabitants find themselves deprived by these interdicts of a considerable part of their ordinary commerce. Even a great many people, who earn their livelihood in preparing and making these kinds of merchandise, thus lose the means of their daily subsistence. Are they so absolutely obliged to abandon, at the pleasure of another, who has nothing to command them, their vocation, and to live in inaction which reduces them to indigence and misery? Or must they die of hunger, in order that others may with so much the more ease overwhelm their enemy? As little as that is compatible with justice, does the custom of interdicting neutrals' commerce in warlike and naval munitions agree with the other usages received in Europe. Neutral powers have been seen to give sometimes millions of subsidies to one of the belligerent parties, without the other's complaining of it, as a violation of neutrality. On the other hand, belligerents will not permit neutral merchants to sell to the enemy a moderate quantity of powder or timber. What proportion is there between a cargo so inconsiderable and millions of money, enough to raise numerous armies and to equip fleets? Besides we have seen very considerable bodies of troops sent by neutral powers to the succour of one of the belligerent parties, without the other's resenting it as an infraction of neutrality. All this is an evident contradiction in

the conduct of the belligerent powers of Europe. This consequence against them may very justly be drawn from it, that permitting a thing that is very detrimental to them, they are so much the more obliged to permit what cannot be so but in a much smaller degree. Let them not act in consequence: it is a great irregularity which is not to be explained but in that it is more easy to seize a defenceless merchant vessel than to take revenge on a powerful prince for having sent pecuniary subsidies or troops to the succour of the enemy.

170. The seizure and confiscation of warlike munitions belonging to neutral merchants and destined for enemies' places is an enormous grievance absolutely contrary to the universal law of nations. [32.] But the states and people of Europe having recognised, either by express treaties, or tacitly, this violent proceeding as a right of belligerents, they must patiently bear the damages resulting from it to their fabricks and commerce, although the belligerents gain nothing by this pretended right. It has never been seen that a party by this has been forced to lay down his arms and ask for peace. Thus it is that the crowns of Portugal and Spain have regarded the affair. For the former, in their treaties with England and the United Provinces, [74, 89.] the latter in theirs with the Hanse towns [75.] have expressly permitted the transportation of warlike munitions to their enemies, with the restriction only that they should not be taken from the territories of Portugal and Spain themselves nor carried from them to enemies' ports. Free trade in these kinds of goods instead of being prejudicial to the belligerent parties, might become rather advantageous to them. For as they both want them, they might provide themselves at their ease, and the more so as the foreign merchants carry them as well to one party as to the other, and think of nothing but making the most they can by them, being otherwise indifferent where they sell them, here or there. The seizure then and confiscation of munitions of war is not so much an advantage to belligerents as a vexation to neutrals. Another grievance not less inconveni-

ent to neutrals is the seizure of their vessels for having laden enemies' goods on board. This ruinous rack of commerce is in contrast not only with the universal law of nations but with that of Europe. [48, 109, 110.] In truth can a more strange despotism be imagined than that exercised by maritime powers over the subjects of neutral states, by ordering them not to ship the goods of foreign merchants in their vessels, nor to carry them to foreign places? Is not this proceeding of the belligerents but little or not at all advantageous to the state itself, the enemy goods seized being commonly abandoned either entirely or for the most part to the cruisers, as their lawfully acquired property. But there remain yet other motives for these seizures of enemies' effects in neutral vessels. It is the desire of commanding and of making others feel the weight of their power; it is caprice and emulation in point of commerce, and it is finally the occasion to distress or ruin the commercial navigation of a neutral people against whom a jealousy is entertained. What law has imposed on neutral powers or can impose on them the obligation to suffer injustice so obvious? It might indeed be objected here that the rights of European powers being equal and reciprocal; what suits one in time of war ought also to suit another, and that thus the right to seize enemies' effects on board neutrals will also be reciprocal. To this I answer that the reasoning is applicable only to maritime powers. But there are very respectable states in Europe which are not such, and whose subjects nevertheless carry on a very considerable commerce by sea, as the German empire, the house of Austria, the king of Prussia, the republic of Poland, the elector of Brunswick Lunenburg, the duke of Mecklenburg, and of Courland. All these states gain nothing by the pretended reciprocity, because when at war they have neither naval forces nor cruisers at sea who can exercise this reciprocal right. Should these powers notwithstanding that bear an evil which they will never have an opportunity to inflict on those from whom they

suffer it? It is easy to see that in this manner natural equality of states and their rights is in effect annihilated.

171. The greater part of the maritime powers of Europe have for a long time delivered the commerce of their subjects from this constraint and these painful shackles, which neither right nor law but an unjust and unreasonable usage had imposed on them. In all their commercial treaties they have stipulated an entire freedom for their vessels and cargoes. It is thus that they changed the ancient usage which abandoned enemies' goods on board a neutral vessel to the discretion of belligerents, and introduced a new principle according to which a neutral vessel inasmuch as she is free renders the cargo free. Conformably to this principle all the causes of neutrals without discrimination should be decided. But the belligerents refuse to admit it, except towards states with which they have concluded treaties according to the said new principle, and they pretend to treat all those with which they have not made treaties, according to the ancient usage, which is very unjust. For the new principle being received in general and in almost all the treaties of commerce, and having thus become the European law of nations in these affairs [110,111.] all neutral states which have not treaties with the belligerents, have a right to require that their subjects should be treated according to the new law of nations, as the king of Prussia did in his dispute with England of which we have given a sketch. [144,147,] Besides, they may demand by their full right of the maritime powers that they make treaties with them according to the new law of nations. Also the states, between which and the belligerents there still subsist treaties framed according to the ancient law of nations may require that these treaties be changed and rendered conformable to the new. For this diminishing the inconvenience of neutral merchants, and giving them great advantages over those in the causes of which the ancient law of nations is applied, it is a just demand of all states which do not enjoy these advantages, that they also be made partakers of them. There is no valid reason for excluding them. As christian

princes of Europe how can they deny each other a thing which even the barbarous states of Africa allow to those who make treaties with them?

172. In order to procure all possible security in time of war to maritime commerce, the increase of which constitutes at present one of the most important objects to all states bordering on the sea, it would be a great advantage for all the states of Europe, and a work well worthy of their sovereigns to have a general code composed of the law of war and marine, wherein the rights of belligerents towards neutral merchant vessels should be punctually determined, and just limits fixed to their too extensive pretensions. The universal law of nations not authorizing any thing of all that belligerents undertake against the merchant vessels of neutral nations, under pretext of the law of nations, namely the seizure and confiscation of contraband and enemy goods in neutral vessels, and neutral goods in enemy vessels, it would be no more than just to restore to neutral merchants the natural rights which have been banished from them by an unjust usurpation. The consent of the maritime powers of the first rank would be in this the principal affair. But might it be hoped from their generosity and humanity that they would prefer yielding to evident equity, to sustaining a right unjust to be sure, but of which they have been in possession for some ages? If unfortunately this hope prove vain it would be necessary to be contented with stipulating that the ancient usage so inconvenient to traders, to stop neutral vessels at sea, to examine them on presumption of their being laden with enemies' goods, and finally to seize them, be abrogated, and that the new principle according to which free ships make free goods, should on the contrary be every where received, and by all European states. Thus the avidity of cruisers would be restrained. They could not require of neutral vessels but the exhibition of their passports and sea-letters, and they would have no pretext for seizing them, nor sending them into port for judicial examination. The subjects of trading neutral states would from this obtain the great advantage of being

able to continue their course by sea without interruption, and without being involved in tedious and expensive proceedings before the belligerent tribunals, where they have nothing to expect but a certain and very considerable loss. Above all such a new regulation would be advantageous to the commercial cities of the empire of Germany, and to others which suffer most in time of wars, their sovereigns having no maritime forces for their protection.

173. Although the belligerent parties by this change of principles and usages would have to lose their pretensions on enemies' effects on board of neutrals, this loss is compensated by the seizure permitted of neutral goods on board enemy vessels: and besides that they retain the right to seize the munitions of war which they should find in neutral vessels destined for enemies' countries and ports. The universal law of nations not permitting either the one or the other, it is a great condescension for neutrals to acquiesce in this, and to regard it as a sacrifice to the necessity in which they find themselves to choose the least of two inevitable evils. In fact it is extremely mortifying for neutral states to be obliged to acknowledge laws so hard and so prejudicial to their rights of sovereignty and to the maritime commerce of their subjects; which on the other hand is very advantageous for belligerents having thus acquired possession of rights to which otherwise they would have no pretence. They may content themselves with these advantages, the more as commonly they compose only the smallest part of the European states, whereas the neutrals compose the greatest. It is more agreeable to equity and reason that the true and incontestable rights of the greater number should precede the ill-founded and problematical pretensions of the lessor; especially in consideration of this that the former lose a great deal by the restriction of their rights, and the latter gain a great deal by the extension of their pretensions. The cause of those who strive only to shun damage is always more favourable than that of those who covet very great and extraordinary advantages, to the prejudice of another.

THE JUDICIARY OF CONNECTICUT.

HAVING recently made an arrangement with Mr. Day, of Connecticut, in consequence of which a portion of his reports will be published in this Journal, it is deemed proper, by the Editor, to give a brief view of the most important part of the judiciary establishment of that state.

The present organization of the Supreme Court of Errors of the State of Connecticut was established by the legislature of that state, in May, 1816. This court consists of all the judges of the Superior Court.

The superior court consists of one chief judge and eight assistant judges, who annually divide themselves into three branches; and the several counties in the state being divided into three circuits, one branch is assigned to each circuit. In all the counties a circuit court is held twice a year. This court has *civil, criminal and chancery jurisdiction*, and, in its several capacities, determines, by the aid of a jury, auditors, referees, or commissioners, when necessary or proper, all issues *in law and in fact*.

There are two terms of the supreme court in a year, which are held, in the months of June and November, at *Hartford* and *New Haven* alternately. In technical strictness, this court has cognizance only of *writs of error*, brought to revise the judgments of the superior court; but as all the individuals composing the former are judges of the latter, a convenient opportunity is afforded, while they are thus assembled, for hearing argument on *motions for new trials* and *cases stated*. These, of course, occupy a considerable portion of the term. The opinions of the judges upon them are given, *by way of advice*, to that branch of the superior court before which the cases are respectively pending; but this advice is always followed, and is considered as settling the law.

The judges for the years 1811, 1812 and 1813 were, the hon. Stephen Mix Mitchell, *chief judge*, and Tapping Reeve, Zephaniah Swift, John Trumbull, William Edmond, Nathaniel Smith, Jeremiah G. Brainard, Simeon Baldwin, Jonathan Ingersoll, *judges*.

~~SCHEMATIC~~

CONNECTICUT.

SUPERIOR COURT, JUNE, 1811.

Robert Peck against Isaac Lockwood.

The right to take shell-fish on the land of an individual, between high and low-water mark, is a common right.

THIS was an action of trespass, *quare clausum fregit*.

The declaration stated, that the defendant entered upon the plaintiff's land, dug up the soil, and destroyed the sedge, herbage, &c. growing thereon, and took therefrom great quantities of oysters, clams, and other shell-fish.

The land described in the declaration, consisted of a tract of upland, and about seven acres of sedge flats contiguous thereto, which were overflowed at high water, but which were above low-water mark, so as to be entirely overgrown with sedge.

On the trial of the cause, it appeared that the defendant, at the time mentioned in the declaration, entered upon such flats, at a place where clams are usually taken, for the purpose of digging clams, and dug and carried away about half a bushel; in doing which he necessarily dug up a part of the sedge there growing, after having been expressly forbidden by the plaintiff.

The plaintiff, in proof of his title to the land mentioned in the declaration, exhibited two deeds; one executed to him, in

1784, by *Jabez Ferris*, and the other in 1789, by *Titus* and *Charles Knapp*. The description of the land conveyed by the first deed, being a part only of the premises, is in the following words, viz. "bounded east by *Timothy Knapp's* land, south by the water, west by said *Peck's* own land, north by *Joseph Sacket's* land." The description in the second deed is in these words, viz. "bounded north by the *Reeds'* meadow, so called, easterly and southerly by the cove, so called, and westerly by said *Peck's* land, in part, and partly by *Sacket's* land."

It was admitted that the grantors of the plaintiff owned all the land included in these deeds; but it was contended, on the part of the defendant, that the words "southerly by the water," in the first deed, and the words "easterly and southerly by the cove," in the second, could not legally be so construed as to include the sedge flats. The plaintiff also proved that he, and those under whom he claimed, had, for more than forty years before the bringing of the suit, annually, and exclusively of all others, cut and taken off the sedge growing on such flats. To rebut the presumption arising from this fact, of a title in the plaintiff, by possession, and to establish the right of the defendant to take the clams in question, the defendant proved, that the inhabitants of the town of *Greenwich*, and other places, had, without molestation, from the first settlement of the country, at proper seasons, entered upon such sedge flats, and dug and carried away the shell-fish, and had also removed so much of the sedge as was necessary for the purpose of taking such shell-fish.

The plaintiff then offered to prove, that such persons, in going to the flats before mentioned, and other parts of the sea-coast, for the purpose of taking shell-fish, proceeded either by water, or upon the land mentioned in the declaration, and other lands of the plaintiff, and of other persons. This evidence was rejected by the court as immaterial; it being agreed, that the defendant was not guilty of any other tres-

any trespass was committed by the defendant, except entering on the land described in the declaration. Whether the defendant might go across other inclosures of the plaintiff, for the purpose of getting to the flats, is not a question before the court. It is not even stated that the defendant was one of those people who went upon other inclosures of the plaintiff.

The only question which remains is this: Is the right of fishing for shell-fish, where the ground must be dug to take them, on land which is covered with water at high-water mark, but which is above low-water mark, or, in other words, on lands over which the tide flows, and from which it ebbs, a public right, which may be exercised by every citizen, or is it a right which belongs exclusively to the proprietor of such land? If the former, judgment must be for the defendant; if the latter, judgment must be for the plaintiff. To settle this question, we are not to resort to any train of reasoning as to what is most or least reasonable. We are not, as in many cases of doubt, to infer what the law is, from the probable good or ill consequences which may follow from establishing one or the other system. It is a question which it is peculiarly the province of the maxim *ita lex scripta est* to determine.

I would here observe, that I do not contend that the proprietor of such land cannot acquire an exclusive right to fish thereon. I admit it. I think this is clearly established by authorities.

As it respects the various methods in which such a right may be acquired, in *England* and in this country, I have nothing to observe. The only question stated on the record is, does such a right result to the proprietor, by virtue of his ownership of the soil? If no such right results to him by the common law, as I shall attempt to prove from the authorities, it behoves him to show that he has gained such right. The presumption is against him; and he must remove this out of the way before he can avail himself of such an exclusive right.

The law of *England*, in this case, must with great propriety be deemed our law; for our ancestors came from that country, bringing with them the legal notions which there prevailed; which have ever been considered the common law of this country, unless altered by our own legislative acts, or so manifestly improper to be received, arising from widely differing local circumstances, that our courts have been obliged to reject them, to attain the ends of justice, for which all laws are made. But in a case where the reason is the same, and as strong in this country as that, and of equal applicability to our circumstances as theirs, the law is the same. In relation to the present subject, there is no statute altering the common law, there is no reason for the existence of such a law in that country, which does not apply with equal force in this; and nothing in our local circumstances which militates against the adoption of it by us. The usage stated in the case I make no use of, except that it furnishes evidence that our ancestors always supposed that they had a right to fish and take clams on such lands as these, the subject of this controversy. Such notions by them adopted, I think, will appear to have been uniformly the law of that country from which they came.

In lord *Fitzwalter's* case, reported in 1 *Mod.* 105, and in 3 *Keb.* 242, we find it laid down by chief justice *Hale*, that in case of a river which flows and reflows, and is an arm of the sea, the right of fishing is common to all, and that, in an action of trespass brought for fishing there, it is a good justification to say, that the *locus in quo* is an arm of the sea. It is clear that by this is meant, *when the proprietor of the soil brings the action of trespass*; for no other person could bring trespass but the proprietor, or some person having a possession under him; and that the case before the court was by the proprietor, is manifest from the observation of lord *Hale*, who says there is no contradiction between the soil being in one, and yet the river common for all fishers. From this case we learn, that the right of fishing in such place where there is a

flux and reflux of the sea, is a right common to every citizen, although the soil be the estate of a particular person.

The doctrine here laid down is every where recognised to be correct. We find the general rule established in *Warren v. Matthews*, reported in 1 *Salk.* 357, and in 6 *Mod.* 73, and in *Carter et al. v. Murcot et al.* 4 *Burr.* 2162. In the last case, it was laid down by lord *Mansfield*, that a man may have an exclusive privilege of fishing in an arm of the sea; but such right is not to be presumed; it must be proved: and Mr. justice *Yates* observes, that he knew a case to fail, wherein this claim was made, because such prescriptive right could not be proved; and in that case it was determined, that a right of fishing in such place was common to all.

The case of *The Mayor and Commonalty of Orford v. Richardson et al.* in the King's Bench, 4 *Term Rep.* 437, and in Error in the Exchequer Chamber, 2 *H. Blk.* 182, was determined wholly upon the ground, that every subject, *prima facie*, has a right to fish in an arm of the sea; yet an appropriate right may be proved in another, which will give him the exclusive privilege of fishing there. No person can read and understand the pleadings in that case, without perceiving that the beforementioned doctrine was admitted by the whole court, and all the counsel, to be correct. We have an authority to this point, in *Com. Dig.* 55. His words are, "Every one may fish in the sea, of common right, though it flows on the soil of another." He cites the case of *Warren v. Matthews*, 6 *Mod.* 73.

The foregoing authorities abundantly prove the general proposition, that the right of fishing on the soil of another, when overflowed with the tide from the sea, or arm of the sea, is a common right. The only doubt that can arise, in cases of this kind, is whether there is a common right of fishing for shell-fish, after the reflux of the tide?

Although this right is nowhere denied by any authority, and as the principle is certainly included in the general proposition, that on such lands the right of fishing is common to every

subject; yet, I think, some reasonable doubt might have been entertained on this subject, if no farther authority could have been produced. The case of *Bagott v. Orr*, 2 Bos. and Pul. 472, is, I apprehend, a case in point. It was the very case of entering upon land of the plaintiff, and taking shell-fish, by digging up the earth betwixt high and low-water mark, which could be done only after the reflux of the sea. This case was determined in favour of the defendant, on the ground that such fishery, in such a place, which is the very case before the court, was a matter of common right. The court, in delivering their opinion, say, that if the plaintiff had it in his power to abridge the common-law right of the subject to take sea-fish (meaning in that case shell-fish, for that was the case before the court), he should have replied that matter specially; and, that not having done so, the defendant must succeed upon his plea for taking the fish.

Here the court most expressly recognise the doctrine, that it is a right common to every subject, to enter upon the lands of the plaintiff, betwixt high and low-water mark, and to take from thence shell-fish, by digging up the soil.

In this opinion the other judges concurred, excepting

BRAINARD, J. who was absent from indisposition, and

INGERSOLL, J. who had been of counsel in the cause.

Judgment to be rendered for the defendant.

LAW'S OF THE SPANISH INDIES.

THE following proposals have been issued for publishing a digest of the laws of the Spanish Indies, by James Workman, esq. counsellor at law.

This work will form two octavo volumes; in the first of which will be given an abridgment of the laws peculiar to the

colonies of Spain. These laws, commonly called the Laws of the Indies, are now compiled in four large folio volumes, and classed in nine books. The following is a short summary of their contents:

The first book is devoted to the establishment of the Christian religion, and the support of its ministers:—This division treats of cathedral and parochial churches, monasteries, convents, hospitals, universities, colleges, and seminaries of education; of the extent of the privilege of asylum, accorded to churches and monasteries; of the royal patronage in ecclesiastical appointments; of provincial and synodal councils; of archbishops, bishops, prebendaries, and generally the clergy, regular and secular, of all classes and orders; of tythes and other ecclesiastical dues; of the tribunals of the inquisition, their jurisdiction and powers; of the ecclesiastical judges, visitors and conservators; of the apostolic bulls and briefs; of the books allowed to be printed and published in the Indies.

The second book treats of the laws and royal ordinances, to be observed in the Indies; of the council of the Indies, its fiscal, treasurer, secretaries, alguacils, advocates, procurators and other officers; of the royal audiences and chanceries, (tribunals of high jurisdiction) and their various officers; of the auditors and visitors of districts, and their jurisdiction; of the administration of the estates of deceased persons, &c.

The third book contains the laws which treat of the royal dominion and jurisdiction in the Indies; of the manner of appointing to offices, and bestowing rewards and favours; of the viceroys, presidents, and presiding governors, and their authority to levy war against hostile or rebellious Indians; of forts, castles, and fortifications, their governors and alcaids, and the revenues assigned for their maintenance; of the pay, privileges, and duties of the military in general, and the mode of deciding causes in which they are interested; of the punishment of pirates; of the application of prize money; of com-

merce with foreigners; of the honours to be paid to viceroys, governors, and other high officers, civil, ecclesiastical, judicial, and military; and lastly, of the conveyance of letters by expresses and post couriers.

The fourth book treats of discovered countries, and the privileges and immunities bestowed on the discoverers; of the reduction, pacification, conversion and colonization of the Indian tribes and nations; of the founding and settlement of new cities and towns, their councils, public offices, and municipal government: of grants, distributions and sales of lands and building lots; of the public property and funds of cities and towns; of public granaries; of duties, taxes, and contributions for objects of public utility; of public works; of roads, inns, taverns, boundaries, mountains, pastures, woods and vineyards; of the commerce, provisions, and productions of the Indies; of the discovery and working of mines, and the privileges to which miners are entitled; of the alcaldes and secretaries of the mines; of the assaying, melting and marking of gold and silver; of the mints and their officers; of the value of gold and silver, and the commerce thereof; of pearl fisheries; of the establishment of manufactures in the Indies.

The fifth book treats of the divisions and limits of governments, and the subordination of certain governors to the viceroys; of governors, corregidores, alcaldes mayores, and alguacils, their duties, privileges and authority; of the ordinary alcaldes, provincials, &c.; of physicians, surgeons and apothecaries; of notaries public, and notaries of the government; of the jurisdiction of the several tribunals, and the manner of determining pleas concerning the cognizance of causes; of suits at law, and the proceedings thereon; of the pleadings, judgments, and executions; of the recusation (or challenging) of judges: of appeals from the inferior tribunals, and from the royal audiences to the king; of the mode of levying executions and the fees thereon; of the examinations or trials which viceroys and other high officers must undergo on resigning, or being removed from their respective offices.

The sixth book contains nineteen titles, which regulate the condition of the native Indians, and treat minutely of their marriages, employments, instruction, tributes, taxes, disabilities, and personal services; of the privileges of the city and republic of Tlaxcala; of the authority, rights, privileges and duties of the Indian caciques or chiefs; of the exemption of the Indians from personal slavery; of the means of reducing the wandering Indians to form towns and settled establishments; of the public property of Indian communities, and the administration thereof; of the good treatment and the official protectors of the Indians; of the allotments (*repartimientos*) of Indians, and the revenues and services which may be exacted from them by the persons (*encomenderos*) to whom they are assigned; of the duties of the encomenderos to protect and defend their Indian vassals, and to promote civilization, learning, and religion amongst them; of the services which the Indians are liable to perform in agriculture and manufactures, in the mines, pearl fisheries, public inns, the transportation of goods, &c.

The seventh book treats of the powers and duties of the judges who are appointed by special commission; of games of chance, and gamblers; of Spaniards absenting themselves in the Indies from their wives, or the ladies to whom they are betrothed in Spain, and how they shall be compelled to return thereto, in order to cohabit with their wives, or to marry their affianced mistresses; of vagrants and gipsies; of mulattoes and negroes; of jails, jailers, and the visitation and inspection of prisons; of crimes and misdemeanors: of fines, and their appropriation.

The eighth book treats of the finances of the Indies, and of the various officers, councils, and tribunals employed in collecting or enforcing the payment of the royal revenues; of the method of keeping the public accounts; of the administration of the royal finances; of the tributes to be paid by Indians who are the immediate vassals of the crown; of the proceeds of vacant *encomiendas*; of the king's

fishes of gold, silver, or other metals; of the administration of the mines; of treasures discovered in caves, Indian temples, or sepulchres; of estrays and deposits; of the *alcavala*, or duties on the sales of property; of custom-houses; of the duties on imports and exports, and the valuation according to which those duties are to be rated; of the penalties incurred by the neglect or violation of the revenue laws; of the importation of slaves, and the duties thereon; of the *media anata*, or first fruits, (the half of one year's salary and emoluments of every place, office, and annuity conferred by the royal authority); of the sale of offices, and the duty on the subsequent transfer thereof; of the royal monopoly of quicksilver and salt; of the duties on sealed, or stamped paper, (requisite to give validity to public acts, and to contracts); of the king's ninths, or portion of the tythes; of the revenues of the vacant bishoprics; of the salaries of the king's officers, and the manner of paying them; of assignments and appropriations of particular revenues; of *libranzas*, or treasury orders; of the closing of accounts, and the manner in which the royal revenue is to be remitted.

The ninth and last book treats of the royal audience and chamber of commerce of the Indies, of its members and officers, its power and duties; of the consulate of merchants at Seville, trading to the Indies, of the levy and administration of the duties on goods exported to the Indies, of the company of merchants, purchasers of gold and silver; of the generals, admirals, and governors of the fleets and armaments of the trade of the Indies; of the inspector, comptroller, victualler, paymaster, storekeeper, clerks, and military officers belonging to the armadas and fleets; of the corporation of ship-owners, pilots and mariners, at Seville—their exemptions and privileges; of licenses to pass to the Indies, and to return to Spain; of foreigners desiring to trade to the Indies; of the building, rigging, and measurement of ships; of the registering thereof; of the search or examination of vessels; of the navigation and voyage of the fleets, and the regulations to be

observed therein; of advice or packet-boats; of underwriters and policies of insurance; of the judges of registers in the Canary islands, and of the commerce and navigation thereof of the navigation and commerce of the Windward islands and the adjacent provinces; of the trade and navigation to the South seas, and to the Phillipine islands, China, New-Spain, and Peru; of the consulates of merchants at Lima and Mexico.

The second volume will contain a brief digest of those general laws of Spain which are in force in her colonies. In this volume will be given a compendium of the ordinances of Bilboa—the principal commercial code of Spain—which treat of merchants and the books they are bound to keep; of partnerships in trade, and the manner in which they are formed, carried on, and dissolved; of commercial contracts, and the formalities requisite to give them validity; of commission merchants; of bills of exchange, promissory notes and letters of credit, of bankruptcies, insolvencies and temporary failures, or suspensions of payment; of charter parties, bills of lading and freight; of shipwrecks; of insurances and averages; of bottomry and respondentia; of masters of vessels, pilots and mariners, and their rights and duties.

This work may be useful to those who carry on a commercial intercourse with South America, or any of the Spanish dominions: and as most of the laws in civil cases, which it will comprise, are still valid in Louisiana, it will be serviceable to the inhabitants of that state.

It may not be unnecessary to inform some readers, that the laws of Spain, like those of most of the other nations of Europe, are derived chiefly from the Justinian code. The discovery of his admirable Digest, was regarded, in the middle ages, as a new revelation. It brought to light a system of jurisprudence which, notwithstanding all its faults, was the best compilation then extant of written reason, applying the maxims of ethics to the various and complicated affairs of human life. Many advantages attended the rise and growth of the

Roman law. It was not like most other codes, the progeny of ignorance and superstition: it was the favoured offspring of civilization and science; and it was matured by the care of many ages, improved by the collected wisdom of various nations, exalted by philosophy and adorned by eloquence.

This code, however, is far from being perfect. Equity itself, in its decisions in civil causes, between those whom it regards as equals; in other causes, it too often breathes the spirit of the harsh and arbitrary government from which it sprung. Much of the authority of that despotism was communicated to a large portion of its subjects. The master in his household, and even the father among his children, were images, in some respects, of the prince on his throne, released from the obligations of the law; and the whole female sex were held in a state of tutelage, impairing the freedom and dignity to which nature entitled them.

During the progress of this system in Europe, it was often mingled with local usages, and always moulded by national character. When it took root in Spain, that nation was animated by religious zeal and romantic gallantry. Modified by these predominating passions, the civil code of Castile seems to be the Roman law, softened by the spirit of chivalry, and purified by the influence of the christian religion. The paternal power was reduced within its proper limits; the female sex were emancipated and peculiarly favoured; and slavery itself assumed the form of protected servitude.

To those who study law as a liberal science the proposed publication will not be unacceptable. To the general reader also, it may afford interesting information relative to the colonies of Spain. Those countries have long been a subject of anxious inquiry, from their great extent and population, their rich and various productions, and the extraordinary state of society by which they are distinguished from the rest of the world. Indeed, the frequent and increasing intercourse of our citizens with them, must give them a higher degree of

interest in our estimation, than curiosity alone can excite. To become well acquainted with the condition of any country, we must obtain a knowledge of its laws; more especially if it be governed like the Spanish dominions in our neighbourhood, where the sovereign regulates, with minute precision, the rights and duties, the privileges and disabilities, of the various classes of his subjects; in a word, every thing relative to their conduct, so far as human conduct is susceptible of being directed or controlled by human power.

The first volume of this work, comprising the laws peculiar to the Spanish colonies, and forming by itself a complete whole, will, we understand, be published separately. The subjoined extracts are from the first book, which treats of the religious establishments of those interesting countries.

BOOK I.—TITLE I.

OF THE HOLY CATHOLIC FAITH.

LAW 1. Our Lord God, through his infinite mercy and goodness, hath vouchsafed to give to us, without any merit on our part, so large a share in the sovereignty of this world, that, besides uniting in our royal person many and mighty kingdoms, which were held by our glorious progenitors, he hath extended our royal crown into great provinces, and extensive territories and dominions by us discovered towards the south, and towards the west. Considering ourselves, therefore, under an higher obligation than any other prince of the earth to contribute to his service, and the glory of his holy name, and to employ all the strength and power he hath given us, in labouring that he be known, acknowledged and adored throughout the whole world, as the true God, and the Almighty Creator of all things visible and invisible; we have happily succeeded in drawing unto the bosom of the holy Roman Catholic Church many of the innumerable tribes and nations of the continent and the islands of the western hemisphere. Now, in order that all may universally enjoy the

admirable benefit of redemption, through the blood of Christ, our Lord, we enjoin and command the aboriginal inhabitants of our Indies, who have not known the faith, that they receive benignly, and listen with attention to the preachers whom we send to effect their conversion and salvation, and that they give entire credit to their sacred doctrine.

We also command the Spaniards and all other christians, inhabitants of those nations and kingdoms, who may have been regenerated by the sacrament of baptism, that they do firmly believe and sincerely confess the mystery of the Most Holy Trinity, Father, Son and Holy Ghost, three distinct persons, and one only true God, and generally all the other articles and mysteries which the Roman Catholic Church believes and teaches: And whoever shall persist in error, through obstinacy, and continue hardened against believing what our holy mother church, holds and teaches, shall suffer the punishments ordained by law.

2. Our captains, officers, discoverers, and all other persons, shall, on their arrival in any of the provinces of our Indies, immediately make known to the Indians, that they are sent by us to teach them good morals, to dissuade them from vice, to instruct them in our faith, for their salvation, and to bring them into our dominion, in order that they may be protected, favoured and defended, like our other subjects.

3. The archbishops, bishops, ministers who have the care of souls, and all other preachers to whom it belongs to teach the christian doctrine, shall take particular care, and use all possible diligence to instruct and confirm the Indians in the articles and tenets of our holy faith.

4. Our governors, and others in authority, in places whose inhabitants are unwilling to receive the christian doctrine in peace, shall concert with the principal cacique, friendly to us, and dwelling on the borders of the hostile Indians. He must be induced to invite some of those Indians into his territory, for the purpose of amusement, or on some similar pretence. The preachers of the faith shall secretly be there at the same

time, with some Spaniards and friendly Indians, so that there may be safety. Then, as occasion may serve, the preachers shall discover themselves to the Indians who have been invited, and begin to teach them, in their own language, or by means of interpreters, the christian doctrine: and in order that they may hear it with more veneration and admiration, the preachers shall wear surplices and stoles, and shall also bear the holy cross in their hands. The christians who are present shall hear them with the greatest attention and awe, so that by their example the infidels may desire to be instructed; and should it appear expedient, in order to excite the more admiration, music, vocal and instrumental, may be employed, that the Indians may be moved into a mild and pacific disposition. If they desire that the preachers go to their settlements, let this be done with caution and circumspection, requiring them first to send their children to be instructed, and holding these as hostages for their fidelity. By these means, and such others as may appear convenient, let the native Indians be always pacified and instructed, without being injured by any means, or on any occasion or pretext whatever, as all that we desire is their conversion and happiness.

7. We command our viceroys, audiences and governors in all the provinces before mentioned, to subvert, demolish and destroy the idols, altars and temples of the pagans; and also that they forbid the Indians to adore idols, or to eat human flesh, even that of prisoners of war, or of such as are slain in battle.

8. The prelates shall not suffer the false priests of idols, nor sorcerers, nor wizards to reside or hold communication with the native Indians.

12, 13. The prelates shall appoint a certain hour, at which all the Indians, negroes and mulattoes, both slaves and free, within their respective settlements, shall assemble every day to hear the christian doctrine. Persons shall be appointed to instruct them, and to oblige their employers or owners to send them to be instructed; nor shall they be otherwise em-

ployed during that appointed hour. Care shall likewise be taken that Indians, negroes and mulattoes, whether free or slaves, living out of villages on working days, shall, in like manner, be instructed on holydays, when they may come to the villages. As to those who live beyond christian settlements, such measures as may appear most expedient shall be taken for their instruction. Those who must assemble every day are the Indians, negroes and mulattoes who usually serve in houses as domestics: such as work in the field shall attend on Sundays and holydays. The time to be employed in instructing them shall be one hour, and no more; and that hour shall be the one which may be most conveniently spared from the service of their masters.

16. No minister of justice, in any part of our Indies, shall presume to go or send to the churches, to serve process, take depositions, or in any manner prosecute suits against the Indians, for any debt or obligation, when they go to hear mass on festivals. Whoever transgresses herein, though he should act under the authority of any of our audiences, shall forfeit his office, and shall lose the debt in question, if due to him; or, if not, shall be fined to the amount thereof, and shall likewise be banished the province.

17. No Indians, negroes, or mulattoes shall work on Sundays or holydays, and care shall be taken that they all keep the festivals as other christians are obliged to do. If this law be transgressed, the Indians, negroes, and mulattoes, and those by whose order they offend, shall be punished at the discretion of the prelates and governors.

18. The prelates shall provide for the administration of the holy sacrament of the eucharist to such Indians as are qualified to receive it.

21. Every Thursday throughout the year, there shall be celebrated, with the utmost possible solemnity, a mass of the most holy sacrament.

23. The bull of our most holy father the pope Paul V, for granting indulgences, exemptions, and absolutions to the In-

dians, shall be published and explained to them with solemn pomp and pious festivity.

24. There shall be celebrated every year a festival of devotion, commencing on the second Sunday in November, and continuing thence for nine successive days, in honour of our Lady the Blessed Virgin, the Patroness and Protectress of all our kingdoms and dominions.

25. It is forbidden to swear by the holy name of God in vain, under the penalty, for the first offence, of ten days' imprisonment and twenty thousand maravedis, and of thirty days' imprisonment and forty thousand maravedis for the second offence; and for the third, besides the last mentioned penalty, four years' banishment beyond the circle of five leagues from the place of the offender's residence. If the offender hath not the means of paying the fine (which shall be divided into three parts, and shared equally between the royal treasury, the judge, and the informer), it shall be commuted for some other suitable punishment. No person, noted for this impious vice, shall be admitted to any honours in the inquisitions, or in colleges, or other communities; nor shall any such person be proposed to us to fill any political or military office; for we expressly declare that all who offend herein, shall besides losing our favour, incur our indignation.

The generals, admirals, and captains of our army and navy shall not neglect to punish this crime in those under their command.

The knights of military orders, the ministers and familiars of the holy office, the men at arms, and the life-guards of viceroys, being prosecuted for this vile and abominable crime, shall enjoy no privilege of jurisdiction, but shall be so far subject to the ordinary tribunals, and by them shall be duly chastised.

The prelates also shall report the persons who shall contravene this law to the viceroys and audiences, that they may punish the offenders; and the curates and religious teachers

shall report to the judges every thing relative to this subject which may require remedy or correction.

26. Viceroy, judges, and all officers, of whatever dignity, and all other christians, who shall see or meet the most holy sacrament of the body of Christ passing in the street, are bound to kneel down on the earth with reverence; to remain in that position till the priest shall have passed, and to accompany the procession to the church from whence it proceeded; nor shall they be excused from kneeling on account of mud or dust, or on any other pretence whatever, on pain of being fined six hundred maravedis. • The infidel Indians shall kneel on the earth, as well as christians: and if any Indian, of the age of puberty, refuses to kneel, he may be taken before the judge, who, on the testimony of two witnesses, may correct him, discretionally.

27. Neither the figure of the holy cross, nor the image or picture of any saint, shall be made or placed where it may be trodden on.

28. Every christian, being in danger of death, shall confess and receive the holy sacrament, if in his power.

TITLE II.

OF THE CATHEDRAL AND PAROCHIAL CHURCHES.

Law 1. The viceroys, presidents, and governors shall inquire and report to us what churches are founded in the Indies, and what others it may be proper to establish for the instruction and conversion of the Indians.

2. Whereas all the churches in the Indies have hitherto been built at the expense of our royal treasury, it is our will that from henceforth the cathedral churches which we may think proper to have erected, shall be built only for one third part at our expense; the Indians of the bishopricks contributing another third, and the remaining third being at the expense of the neighbouring feudatories. For the Indian fiefs incorporated in our royal crown we will contribute propor-

tionably. All other Spaniards living in the diocese shall contribute according to their circumstances; and what is contributed by them shall be deducted from the portions to be furnished by the Indians and the feudatories. If there be any deficiency, it shall be made up out of the produce of the vacant sees.

3. The parochial churches in like manner shall be built, one third at our expense, one third at that of the feudatories, and the remaining third at the expense of the Indians of the vicinity.

TITLE III.

OF MONASTERIES AND ORPHAN HOUSES.

Law 1. Monasteries shall be founded in the cities of our Indies, for monks and for nuns, but not without our special permission, and the approbation and license of the diocesan prelate; and if any religious house be built or begun without the aforesaid authority, it shall without delay be demolished.

2. When we shall have given our license for the foundation of a monastery, no more land shall be taken for it than may be necessary for the commodious habitation of its members; and if the monastery be not completed within the limited time, the viceroy may give the land to another order, having our license for a similar purpose.

3. Monasteries founded in the settlements of the Indians, shall be at least six leagues distant from one another.

4. The monasteries shall be plain: when erected in the encomiendas of our royal crown, the buildings shall be at our cost; but if they are established in the encomiendas of private persons, then the buildings shall be at our expense jointly with that of the encomenderos, and the Indians of the township shall contribute according to their means.

5. On the foundation of every new convent in the Indies, it shall be entitled to receive from the royal treasury one suit of ornaments, a chalice, a patten, and a bell.

6. In monasteries and nunneries, endowed and founded from the royal treasury, the larger chapels shall be reserved to us; but the monks and nuns may dispose of the other chapels and burial places.

7. The eleemosynary donations of wine and oil, which we have made to some poor convents, for celebrating the holy sacraments, shall be administered with frugality. They shall be given only to those convents whose poverty renders the assistance necessary for the divine worship. The donations shall be dispensed either in specie or in kind, and not in silver in ingots. Our royal officers shall not levy duties from convents of the mendicant orders.

15. Whereas several royal orders have been issued for relieving with medicines such friars as are sick in the monasteries of our Indies, and for the necessary diet and support of those newly arrived, whose health requires to be re-established, those orders, and such as may hereafter be transmitted, shall be observed and fulfilled with punctuality.

16. The prelates shall not suffer the nuns in any monastery to exceed the number allotted by its foundation, and if so many cannot be maintained, they shall be reduced to the number for which there may be a suitable support. The regulations of the council of Trent, allowing nuns freely to renounce their inheritances, shall be observed.

17. An orphan house having been founded in the city of Mexico, for the reception, support, and instruction of the many female orphans there, of the mixed race (the descendants of Spanish and Indian parents), the viceroys are enjoined to make that establishment an object of particular attention, and by all possible means to promote its prosperity.

18. The viceroys shall annually visit the college of female children in Mexico, and see that they be well maintained, and virtuously instructed in every thing conducive to the service of God, and to their own welfare. The viceroys shall examine how the funds are expended, and shall aid and favour the establishment, as occasion may allow or require.

19. The viceroys shall take under their very special care and protection the houses founded and endowed for the reception, and education of Indian young ladies. They shall found such houses where they are wanting, and appoint respectable matrons to reside in and govern them. The young ladies shall be diligently instructed in the Spanish language, and in the christian doctrine and prayers: they shall also be exercised in reading edifying books, and shall not be permitted to speak their vernacular tongue.

TITLE VIII.—CONTAINING NINE LAWS.

OF THE PROVINCIAL AND SYNODAL COUNCILS.

Provincial councils shall be celebrated in the Indies, conformably to the briefs of the holy see. The viceroys and presidents shall assist at those councils, in the king's name. For each diocess a synodal council shall be convoked once in each year. These councils shall be held at as small an expense as may be. The ecclesiastics and monks who are members of them may vote freely, and give their opinions without impediment. The acts of provincial councils must be seen and approved by the council of the Indies, and the acts of synodal councils by the viceroys, presidents and audiences, before they can be executed or have any effect. The clergy and doctrinal curates must have in their possession, and be well acquainted with all the decrees and resolutions of the provincial councils. These councils shall regulate the dues and rights which may be claimed by ecclesiastics for saying mass, accompanying interments, celebrating private marriages, assisting at divine offices, anniversaries, and every other ecclesiastical ministry.

TITLE IX.—CONTAINING TEN LAWS.

OF THE APOSTOLIC BULLS AND BRIEFS.

The apostolic bulls and briefs, not derogatory to the rights conceded to us by the holy see, shall be observed and exe-

cuted, having previously been seen and approved by the council of the Indies. Our ambassadors at Rome may not accept or solicit, for any person whatever in our Indies, any grace, favour, or dispensation from the holy see, unless with our approbation signified to them by our royal council.

TITLE X.—CONTAINING EIGHTEEN LAWS.

OF THE ECCLESIASTICAL JUDGES AND CONSERVATORS.

The laws of Castile, forbidding ecclesiastical judges to usurp the royal jurisdiction, shall be strictly observed. The ecclesiastical judges shall not take cognizances of the causes, civil or criminal, of the Chinese, the Moors, or unbelieving Indians; nor may they proceed against corregidores, on pretence of their violating their oath not to engage in commerce; nor shall they condemn the Indians to pecuniary penalties or to labour, or to be sold to servitude for a certain number of years. They shall receive, when proper, the aid of the royal authority; without which they shall not execute or arrest any lay person. No duties shall be levied on the Indians, on pretence of supporting the ecclesiastical judges. The prelates of religious orders shall not appoint conservatory judges, unless conformably to the provisions of the council of Trent. These judges shall not in any manner exercise jurisdiction over the persons of archbishops or bishops. They shall be compelled by the audiences to a precise and punctual observance of the laws.

TITLE XII.—CONTAINING TWENTY-TWO LAWS.

OF THE CLERGY.

No ecclesiastic may be an *alcaldé*, an advocate or a notary public; nor a factor, merchant or dealer in any kind of commerce. The clergy may not employ negroes in the pearl fishery, nor hold property in the mines; nor employ lay persons secretly to make contracts or negotiations for them.

Prebendaries and other priests may dispose of their property by testament. Scandalous and incorrigible priests shall be delivered up to the secular power, and prosecuted to severe and condign punishment. Seditious and disorderly ecclesiastics shall be punished and sent out of the country. Traitors and insurgents who, to avoid punishment, obtain ordination or enter into monasteries, shall be arrested and sent back to Spain. A priest having resided four months in any diocese, shall not leave it without letters of dismissal from the prelate. No priest or monk shall come from the Indies to Spain without being duly licensed. Preachers must not in their pulpits use any scandalous words, touching the government, or reflecting on the character of public officers or private individuals, on pain of being embarked and sent off to these kingdoms. Ecclesiastics are forbidden to game for any sum whatever. Priests and monks must present themselves when required to the viceroys and audiences.

TITLE XIV.—CONTAINING NINETY-THREE LAWS.

OF THE REGULAR CLERGY, OR MONKS.

The viceroys and governors shall inform themselves of the monasteries and monks within their districts.—The provincials of the religious orders shall keep correct lists of the monasteries in their respective provinces, specifying the number of monks residing in each, with their particular names, offices, ministry, condition and qualities. These lists shall be sent every year to the viceroys and audiences, by whom they shall be carefully preserved. The monks sent from Spain to the Indies must be persons of approved probity and christian faith; they shall receive pecuniary succours, and their passage shall be paid from the royal treasury. Those who embark for the Indies, may not remain in the Canary islands, nor shall those appointed for one mission go to another without license. Foreign monks may not pass to the Indies; nor those monks who are not in obedience to their prelates, nor

any others but those who are zealous in the cause of our holy religion, and exemplary in their conduct and ministry. Monks shall not be permitted to take any of their relatives with them to the Indies. Those sent to the Phillipine islands by our order shall be particularly protected and favoured: no monks shall go from those islands to China or Japan to instruct the people of those empires in the christian doctrine, without the license of the governor, and of the archbishop. The monks who go on missions to convert and instruct the native Indians shall be supplied with what is necessary, and receive favour, honour and protection.

The prelates and visitors of religious orders, appointed to examine and reform them, shall receive all requisite aid from the viceroys and tribunals; these visitors must not occasion any expense, injury or vexation to the Indians. No professed monk shall hold any particular property directly or by means of lay trustees. The order of St. Francis shall receive out of the royal treasury an annual pension or allowance of two hundred ducats. The religious orders may hold their chapters and elections where they think fit, provided it be not in the Indian towns. The monks must not intermeddle with the affairs of government, nor shall our judges interfere in the administration or discipline of the religious houses of either sex: but the viceroys and audiences may remedy and adjust disputes between monks and Indians; those disputes which arise between the regular and secular ecclesiastic, shall be made known to the prelates, by whom the offending parties shall be justly chastised.

Baptisms must not be performed, nor marriages celebrated in convents. The monks shall preach gratuitously in the metropolitan and cathedral churches on festival days. They shall not employ Indians as servants, unless when absolutely necessary, and never without paying them reasonable wages: they shall not keep shops or engage in any kind of commerce: they must not come from the Indies to Spain, without the express license of their prelates, and the permission of the vice-

roy or governor; nor shall they bring more money with them than is necessary for the expense of the voyage. No professed monk shall act as agent, procurator or solicitor, nor appear or be heard in court, without first exhibiting the special license of his prelate.

TITLE XV.—CONTAINING THIRTY-FIVE LAWS.

OF MONKS EMPLOYED AS RELIGIOUS INSTRUCTORS OF THE INDIANS.

In the presentation and appointment of those religious instructors, the regulations and forms of the royal patronage shall be observed. The said instructors must be well acquainted with the language of the Indians whom they are appointed to instruct: they must be furnished by the prelates of their respective orders with sufficient clothing and sustenance, and particularly with wine: they must also be provided each with a horse, so that they may be enabled to visit the sick Indians, to afford them consolation, and administer to them the holy sacraments. When practicable, they shall live together in small communities of three or four each. They must not employ the Indians to carry burdens on their shoulders. If their own prelates fail to punish them for their offences, let it be done by the ordinary, pursuant to the provisions of the council of Trent. They must observe the ordinances of the synodal councils, and must contribute to the support of the collegiate ecclesiastical seminaries.

TITLE XVI.—CONTAINING THIRTY-ONE LAWS.

OF TYTHES.

Forasmuch as the ecclesiastical tythes of the Indies belong to us by the apostolic grants of the sovereign pontiffs, we command the officers of the royal revenue, in their respective provinces, to recover and receive the tythes as they become due, so that the churches may, by means thereof, be supplied with

suitable ministers, and provided with every thing necessary for the service and worship of God.—Tythes are due on the following articles: to wit, wheat, corn, barley, rye, millet, maize or Indian corn, Indian wheat, large wheat, oats, peas, French beans, lentils, vetches, rice, cocoa, and every species of grain, vegetables and seeds. The tythe shall consist of a full tenth of each article, without any deduction or defalcation whatever. Tythes are also due on lambs, kids, young pigs, young calves, colts, young mules, asses, chickens, goatings, ducklings, and young pigeons, though raised for domestic use; also on milk, cheese and wool; on fruits of every kind, except pine apples; on garden vegetables of every description; on honey, wax and bees; on silk, flax, hemp, cotton, the shumac herb, madder, wood and chalk. First fruits are also due on every thing gathered; that is to say, if six bushels or upwards be gathered, the first fruits shall be half a bushel, and never more. If less than six bushels be gathered, no first fruits shall be paid thereon.—Sugar shall pay, in lieu of tythes, five per cent., if coarse, and only four per cent. if it be refined.—The tythes of cattle shall be payable in the fields where they are raised. The tythes of agricultural produce are payable where it is cut down or gathered. The Indians shall not be forced to carry their tythes on their shoulders for the clergy. Gold, silver, pearls, precious stones, and generally all metals are exempted from paying tythes.—The estates of the king, and those of the knights of the military orders shall pay tythes.—In the Indies no *personal tythes* shall be levied.—From the tythes of each bishoprick shall be taken the subsidy or portion allotted by the act of its erection, for the use of the bishop and chapter. Of this portion, the one fourth part shall belong to the bishop himself; and if it falls short of 500,000 maravedis, the deficiency shall be supplied from the royal treasury.—The tythes of each cathedral church shall be appropriated as follows: one half of the whole shall be given to the bishop and chapter: the other half shall be divided into nine equal parts.

whereof two parts shall be reserved for the king, three parts for building and repairing the cathedral church and the hospital, and the remaining four ninths shall be appropriated to pay the curates and other ecclesiastics, pursuant to the provisions of the act of erection. When the tythes are not sufficient for the support and endowment of a cathedral church, they shall be collected and placed in the royal treasury, which shall thereupon become charged with the support of the prelate, the chapter, and the cathedral ministers. The parochial tythes shall be rented, and the amount shall be distributed as follows: one half to the bishop and chapter of the diocese: the other half shall be divided into nine equal parts, whereof two parts shall be for the king, three parts for the support of the parochial church and the hospital, and the remaining four ninths for the maintenance of the parochial ministers, and the administration of the holy sacraments.—The receipt and administration of the king's ninths of tythes shall belong to the officers of the royal revenue. The ninths shall be taken from the gross amount of the tythes, without any deduction. The fiscal officers shall be present at, and superintend the renting of the tythes. When the episcopal tythes are sufficient for the support of the cathedral, the administration of those tythes shall belong to the bishop and chapter. When the accounts of the receipt and distribution of the tythes are taken, a fiscal officer and a judge shall attend. Tythes shall never be rented to ecclesiastics, of any class or denomination, directly or indirectly.

TITLE XIX.

OF THE TRIBUNALS OF THE HOLY OFFICE OF THE INQUISITION.

Law 2. We receive into our protection, and place under our royal safeguard and protection, the apostolic inquisitors of our Indies, their ministers and officers, with their property and every thing appertaining to them, in order that they may freely exercise the holy office with which they are charged.

And we command that no person, of whatever state, condition or dignity he may be, shall presume to injure or disturb them, or permit them to be molested in any manner, on pain of incurring the punishment of those who violate the safeguard of their natural lord and king.

THE CIVIL LAW.

A translation of the body of the civil law has long been a desideratum in English literature. The Digest or Pandects of Justinian, the great reservoir of that system, is the fountain from which have flowed most of the laws by which all the nations of the christian world are now regulated. Yet that rich fountain remains locked up, not only to the mere English scholar, but even, in part, to the classical Latinist, who has not studied the technical phraseology of the Roman jurisprudence. To supply this deficiency would be honourable to America; and we are not without hopes that this may be done, even through the medium of the Law Journal, if the public or the profession will afford it an adequate patronage.—The following article is offered, as a specimen of such a translation as we believe could be obtained: it is from the pen of Mr. Workman, and is intended, not only to give the precise meaning, but to preserve also, as far as our language will permit, the peculiar style of the original. The Latin is printed opposite to the English, that the learned reader may at once judge of the correctness of the version.

THE INSTITUTES OF JUSTINIAN.

INTRODUCTION—CONFIRMATION OF THE INSTITUTES.

Of the Use of Arms and of Laws. 1. Of the Wars and Laws of Justinian. 2. Of the Compilation of the Code, and the Pandects. 3. Of the Time, the Authors, the Object and Utility of these Institutes. 4. Division of the Institutes. 5. What they contain. 6. Books from which they were compiled—Confirmation of them. 7. Exhortation to the study of Jurisprudence.

In the name of our Lord Jesus Christ.—The Emperor CÆsar FLAVIUS JUSTINIAN, Alemanicus, Gothicus, Francicus, Germanicus, Anticus, Alanicus, Vandalicus, Africanus,—Pious, Happy and Glorious, Triumphant Conqueror, always August—

To the Youth desirous of the Knowledge of the Laws—Sends Health.

The imperial majesty should not only be illustrated by arms, but armed also with the authority of laws; so that in war, as well as in peace, the empire may be rightly governed. A Roman sovereign should not only be victorious in battles, but should use every lawful means to expel iniquities from the state, and become as renowned for a most religious observance of justice, as for splendid triumphs over his vanquished foes.

§ 1. By the utmost labour, vigilance and foresight, and with the favour of God, we have happily pursued this double path: the Barbaric nations, subjected to our yoke, acknowledge our warlike achievements; Africa, with innumerable other provinces, reunited after so long an interval to the Roman domain and our empire, bear testimony of our heaven-bestowed victories: and now the whole world is ruled by the laws made and promulgated, as well as those collected and digested by our authority.

§ 2. When we had arranged the imperial constitutions, which before were confused and contradictory, in a lucid and harmonious order, we then extended our care to the immense

INSTITUTIONES D. JUSTINIANI.

PROŒMIUM DE CONFIRMATIONE INSTITUTIONUM.

De Usu Armorum et Legum. 1. De Bellis et Legibus Justiniani. 2. De Compositione Codicis et Pandectarum. 3. De Tempore, Auctoritatibus, Fine et Utilitate Compositionis Institutionum. 4. Diviso Institutionum. 5. Quid in Institutionibus contineatur. 6. Ex quibus Libris composite sunt Institutiones, atque earum recognitio, et confirmatio. 7. Adhortatio ad studium Juris.

In nomine Domini nostri Jesu Christi.—Imperator, CÆsar FLAVIUS JUSTINIANUS, Alemanicus, Gothicus, Francicus, Germanicus, Anticus, Alanicus, Vandalicus, Africanus, Pius, Felix, Inclytus, Victor ac Triumphator, semper Augustus—

Cupidæ Legum Juventuti S.

Imperatoriam majestatem non solum armis decoratam, sed etiam legibus oportet esse armatam; ut utrumque tempus et bellorum et pacis recte possit gubernari: et princeps Romanus non solum in hostilibus præliis victor existat, sed etiam per legitimos tramites calumniantium iniquitates expellat: et fiat tam juris religiosissimus, quam, victis hostibus, triumphator magnificus.

§ 1. Quorum utramque viam cum summis vigiliis, summaque providentia, annuente Deo, perfecimus: et bellicos quidem sudores nostros barbaricæ gentes, sub juga nostra redactæ, cognoscunt: et tam Africa, quam aliæ innumeræ provinciæ, post tanta temporum spatia, nostris victoriis a cœlesti numine præstitis, iterum ditioni Romanæ, nostroque additæ imperio, protestantur. Omnes vero populi legibus tam a nobis promulgatis, quam compositis, reguntur.

§ 2. Et cum sacratissimas constitutiones, antea confusas, in luculentam ereximus consonantiam, tunc nostram extendimus curam ad immensa veteris prudentiæ volumina; et opus des-

volumes of the ancient jurisprudence; and wading, as it were, through that ocean, by the favour of heaven we completed the digest,—a work the execution of which had been despaired of.

§ 3. As soon as this, through the blessing of God, was accomplished, we convoked the 'eminent Tribonian, a man of consular dignity, master of the offices, and formerly quæstor of our sacred palace, together with Theophilus and Dorotheus (personages illustrious for their universal talents, their knowledge of jurisprudence, and their well-tryed fidelity in our service), and particularly commanded them to compose these institutes, conformably to our instructions; so that you might be enabled to learn the first principles of the law, not from obscure ancient fables, but by the splendour of imperial authority; that your minds should not be burdened with any thing useless or obsolete, but instructed in those laws only which are recognized and observed; and that, although four years were formerly scarce sufficient to prepare the student for reading the imperial constitutions, you might enter upon the study of them at once: and you are deemed worthy of this high honour and felicity, that both the beginning and the end of your legal learning will be communicated to you by the voice of your prince.

§ 4. After we had, with the assistance of the same exalted Tribonian, and other illustrious and most eloquent men, completed the fifty books of the Digests or Pandects (in which the whole ancient law was comprised), we ordered that the institutes should be divided into four books, which may serve as the first principles of jurisprudence.

§ 5. In these are briefly expounded the laws which were formerly in force, and those also which, having fallen into obscurity through desuetude, have been restored to light by our imperial providence.

§ 6. Which books,—compiled from all the Institutes of the ancient jurisconsults, but principally from the commentaries, institutes and collections of our beloved Caius,—having been presented to us by the three above-mentioned wise and enlightened jurists, we read and examined them attentively; and

peratum, quasi per medium profundum euntes, coelesti favore jam adimplevimus.

§ 3. Cumque hoc, Deo propitio, peractum est, Triboniano, viro magnifico, magistro, et exquæstore sacri palatii nostri, et exconsule, nec non Theophilo et Dorotheo, viris illustribus, antecessoribus (quorum omnium solertiam, et legum scientiam, et circa nostras jussiones fidem, jam ex multis rerum argumentis accepimus), convocatis, mandavimus specialiter, ut ipsi nostra auctoritate, nostrisque suasionibus, Institutiones componerent; ut liceat vobis prima legum cunabula non ab antiquis fabulis discere, sed ab imperiali splendore appetere: et tam aures, quam animi vestri, nihil inutile, nihilque perperam positum, sed quod in ipsis rerum obtinet argumentis, accipiant: et quod priore tempore vix post quadriennium prioribus contingebat, ut tunc constitutiones imperitorias legerent, hoc vos a primordio ingrediamini, digni tanto honore, tantaque reperti felicitate, ut et initium vobis, et finis legum eruditionis, a voce principali procedat.

§ 4. Igitur post libros quinquaginta Digestorum, seu Pandectarum (in quibus omne jus antiquum collectum est, quod per eundem virum excelsum Tribonianum, nec non cæteros viros illustres et facundissimos, confecimus), in quatuor libros easdem Institutiones partiri jussimus, ut sint totius legitimæ scientiæ prima elementa.

§ 5. In quibus breviter expositum est, et quod antea obtinebat, et quod postea, desuetudine inumbratum, imperiali remedio illuminatum est.

§ 6. Quas, ex omnibus antiquorum Institutionibus, et præcipue ex commentariis Cæii nostri, tam institutionum, quam rerum quotidianarum, aliisque multis commentariis compositas, cum tres viri prudentes prædicti nobis obtulerunt, et legimus, et recognovimus, et plenissimum nostrarum constitutionum robur eis accommodavimus.

§ 7. Summa itaque ope, et alacri studio, has leges nostras accipite: et vosmetipsos sic eruditos ostendite, ut spes vos pulcherrima foveat, toto legitimo opere perfecto, posse etiam nostram rempublicam, in partibus ejus vobis credendis, gubernari.

D. CP. XI. Kalend. Decemb. D. Justiniano PP. A. III. COS.

we have now given to them the fullest force and validity of our constitutions.

§ 7. Receive then these our laws, and study them with the utmost care and alacrity; and so distinguish yourselves by the knowledge of them, that when your legal studies are completed, you may cherish the fair hope of being entrusted with a share in the government of our empire.

Given at Constantinople, on the eleventh day before the calends of December (21st November, A. D. 533), by the Emperor Justinian, always August, in his third consulate.

TO READERS AND CORRESPONDENTS.

The Editor of this Journal expects to procure a number of very valuable MSS. from some of the most eminent members of the bar in the state of Virginia.

From Mr. DAY, of Connecticut, whose reputation as a reporter and an annotator is well established, he has received several communications, which arrived too late for this volume.

By the politeness of the family of the late JAMES A. BAYARD, Esq. he is favoured with the perusal of the law papers of that distinguished advocate and statesman, from which a variety of decisions in the courts of Delaware may be collected, which will prove particularly interesting to practitioners in that state.

The Editor returns his thanks to one of the members of the same bar, for his communication respecting certain judgments pronounced on circumstantial evidence, which he will endeavour to lay before the readers of this Journal, at no distant period.

These are among the materials of which our *seventh* volume will be composed. The latter part of the sixth volume will contain an important decision in the state of Virginia.

THE
AMERICAN LAW JOURNAL.

VIRGINIA—COURT OF APPEALS.

FAIRFAX'S *Devisee* v. HUNTER.

The 25th section of the judicial act of congress, giving appellate jurisdiction to the Supreme court of the *United States*, in certain cases therein specified, to re-examine, and reverse or affirm, the decisions of the Supreme state courts, is unconstitutional.

THE original case was determined in the court of Appeals of Virginia, by judges *Fleming* and *Roane*, and is reported in vol. 1. p. 218. of *Munford's Virginia Reports*. The following succinct state of the case, by judge *Roane*, in giving his opinion, is full enough for our present purpose.

" This was an ejectment, brought by the appellant (*David Hunter*) against *Denny Fairfax*, under whom the appellee (devisee of *David Fairfax*) claims in the District court of *Winchester*.

" At the trial, the parties argued a case in lieu of a special verdict. That case agrees, *inter alia*, various acts of assembly respecting the territory of the *Northern Neck*, as is therein more particularly stated; the treaty of peace of 1783, between the *United States* and the king of *Great Britain*; the act of 1784, respecting future confiscations; that *lord Fairfax* (the proprietor

of the Northern Neck) died, a citizen of this commonwealth, in December 1781, having devised his lands in the *Northern Neck* to *Denny Fairfax*, who was born in *England*, in the year 1750, and has never become a citizen of *Virginia*, nor of any of the United States; that the land in controversy was a part of the lands in that territory called and described by *lord Fairfax*, as waste and ungranted land; that the appellant (*Hunter*) obtained a grant therefor, from the commonwealth of *Virginia*, on the 30th of April, 1789, entered, and was possessed in pursuance thereof, until ejected; and that no inquisition of escheat or forfeiture was ever found in relation to this land, under the ordinary acts on this subject, as extended to the said territory, since the death of *lord Fairfax*.

“ Referring to the case itself for a more particular statement, these are the facts which seem most important in the present instance. There are other facts, which seem to relate to the question, whether *lord Fairfax* had an absolute fee estate in the soil of the said territory, or only a seignoral right thereto: a question unnecessary to be stirred in the present instance, as my opinion will go upon the admission that he had the former. The District court gave judgment for the appellee (*Fairfax's* devisee), from which an appeal was taken by the appellant (*Hunter*) to this court. It is necessary here to state, that the judgment was rendered the 20th day of April, 1794; which accounts for the omission to state in the case agreed, either the treaty of 19 November, 1794, between the *United States* and *Great Britain*, or the act of compromise of 10 October, 1796, between the commonwealth and the purchasers under *Denny Fairfax*.

“ On the part of the appellant (*Hunter*) it is contended, that *Denny Fairfax* was, at the time of the devise in question, and ever after, an alien, and incapable of holding lands in this commonwealth; that admitting an inquest of office to have been necessary under the general laws, as applying to ordinary cases, the several acts of assembly stated in the case, respecting the mode of acquiring titles to waste and unappropriated lands in the *Northern Neck*, were equivalent thereto, and supplied the

place thereof, in relation to such lands, and justified the grant by the commonwealth; and that the act of compromise of 1796 aforesaid ceded the title to the appellant (*Hunter*), even if it were not complete without it.

“On the part of the appellee (*Fairfax's* devisee), on the contrary, it is contended that the original appellee, *Denny Fairfax*, was capable of taking and holding the land devised to him, until divested by an inquest of office, or some equivalent act, and that no such act had taken place prior to the treaty of peace, which (it is further alleged) protected his property, and released the right of the commonwealth to the land in question. It is also contended, that the act of compromise (being passed subsequent to the judgment in this case) does not affect it, and cannot be introduced into the cause so as to vary that judgment.”

The opinion of judge *Roane* was in favour of *Hunter*, on all the points above stated; judge *Fleming's* opinion was in favour of *Fairfax's* devisee, on all the points but the last; on which he agreed that the act of compromise of 1796* vested a com-

* This act, reciting a controversy between the commonwealth of *Virginia* and the devisees of *lord Fairfax*, and a resolution of the legislature, that in case the devisees of *lord Fairfax*, or those claiming under them, would relinquish all claim to lands, supposed to lie within the *Northern Neck*, which were waste and unappropriated at the time of *lord Fairfax's* death, it would be advisable for the commonwealth to relinquish all claim to any lands specifically appropriated by the said *lord Fairfax* to his own use, either by deed or actual survey; and reciting, that this proposal had been accepted:—for carrying the said agreement and accommodation into effect, *Enacted*, “That upon the execution of a deed by *Denny Fairfax*, or those having title under him or *lord Fairfax*, extinguishing, on behalf of the commonwealth, his or their title to all lands lying within the *Northern Neck*, which, by the terms of the above recited proposal and agreement, he or they are bound to relinquish; all claim, right, and title of the commonwealth of *Virginia*, in and to any lands lying in the said *Northern Neck*, which are by the terms of the said proposal and agreement to be relinquished, shall from thenceforth be extinguished, null, and void; and the said *Denny Fairfax*, and those claiming under him, and his or their heirs, shall hold the same, as if he the said *Denny* had been a native citizen

plete title in *Hunter*. The result was that the judgment of the District court for *Fairfax's* devisee was reversed, and judgment entered for *Hunter*.

To this judgment *Fairfax's* devisee obtained a writ of error from the Supreme court of the *United States*; where the judgment of the court of Appeals of *Virginia* was reversed, and that of the District court of *Winchester* affirmed. Upon which the Supreme court of the *United States* sent to the court of Appeals of *Virginia* the following mandate:—

“ *United States of America*, to wit: the president of the *United States*, to the honourable the judges of the court of Appeals in and for the commonwealth of *Virginia*, greeting: Whereas lately, in the court of Appeals in and for the commonwealth of *Virginia*, in a cause wherein *Timothy Trytitle*, lessee of *David Hunter*, was plaintiff and appellant, in said court, and *Philip Martin*, heir at law and devisee of *Denny Fairfax*, deceased, was defendant and appellee, in a plea of ejectment (the same being an appeal from the court held for the district, &c.) the said court of Appeals did, by judgment of said court, reverse and annul the judgment of the said court, for the district, &c. with costs, and did give judgment for the appellant in the said court of Appeals, against the said appellee, and the costs of the said appellant in the said District court; as by the inspection of the transcript of the record of the said court of Appeals, which was brought into the Supreme court of the *United States*, by virtue of a writ of error, agreeably to an act of congress in such case made and provided, fully and at large appears. And whereas, in the term of February, 1813, the said cause came on to be heard in the said Supreme court, on the said transcript of the record of the said court of Appeals, and was argued by counsel; on consideration whereof this court is of opinion that there is error in the judgment of the court of Appeals in and for the commonwealth of *Virginia*: It is therefore adjudged and ordered that the judgment of the court of Appeals in and for the commonwealth of *Virginia* of this commonwealth, and as if no escheat or forfeiture thereof had ever taken place; any act to the contrary notwithstanding.”

nia, in this case, be and the same is hereby reversed and annulled, and that the judgment of the District court of *Winchester* be affirmed, with costs; and it is further ordered that the said cause be remanded to the said court of Appeals, in and for the commonwealth of *Virginia*, with instructions to enter judgment for the appellant, *Philip Martin*—and the same is hereby remanded accordingly. You therefore are hereby commanded, that such proceedings be had in the cause as, according to right and justice, and the laws of the *United States*, and agreeably to said judgment and instructions of said Supreme court, ought to be had, the said writ of error notwithstanding. Witness, &c.”

When this mandate was presented to the court of Appeals of *Virginia*, that court, after much reflection, informed the bar, “that it had doubts whether it ought to register and enforce the mandate? whether this was a case in which jurisdiction was given to the Supreme court of the *United States* by the judicial act of congress? whether it was shown of record that any decision was given by this court against the validity or application of any treaty? and whether the jurisdiction exercised in this case by the Supreme court of the *United States* be justified by the constitution?” Upon these points the court desired to hear the counsel of the parties, and any other gentleman who was disposed to express his sentiments, the questions being of great delicacy, and of public concernment.

These points, thus suggested, were accordingly argued by *Wirt* and *Leigh*, of counsel for *Fairfax's* devisee, and by *Williams*, of counsel for *Hunter*; and (in consequence of the invitation of the court) by *Nicholas*, attorney-general of *Virginia*, and *Hay*, then district attorney of the *United States*.

Leigh, for *Fairfax's* devisee. The doubts suggested by the court are resolvable into two questions: Is the judicial act of congress, giving the Supreme court of the *United States* appellate jurisdiction over the Supreme state courts, in the cases therein specified, constitutional? If so, does it give such appellate jurisdiction in this case? But there is a preliminary question, which I must beg the court to consider: To which does it

belong to decide points of federal jurisdiction, to the Supreme court of the *United States*, or to the Supreme state tribunals?

I contend that it belongs to the Supreme court of the *United States* to determine, in the last resort, what jurisdiction it may constitutionally and legally entertain.

In the first place, all such questions involve the construction of the constitution, and the construction, application, and validity of a law of the *United States*, namely, of such parts of the constitution, and of the act of congress, as define the cognizance of the national judiciary. They are, in the strictest sense, questions arising under the constitution and laws of the union. There is no more common and fit subject of judicature than that of jurisdiction. Neither is there an imaginable ground for a distinction, in regard to the proper tribunal to expound them, between those parts of the national institutions that relate to that subject, and any other parts thereof. The *whole* judicial power of the union is vested in its judiciary; that power is expressly extended over its constitution, laws, and treaties, without any exception; and these are ordained the supreme law of the land, paramount to the laws, constitutions, and courts of the several states. [*Const. U. S. art. 3. §. 1, 2. art. 4. cl. 2.*] The right of the national judiciary to ascertain its own cognizance, results, therefore, from the very words and plain sense of the constitution. It were strange indeed if the right of expounding one part of the supreme law of the union were denied to the national tribunal, and conceded to it as to all the rest—if the right of expounding that law were withheld from the federal judiciary, appointed to enforce it, and specially entrusted with and responsible for its due administration, and conceded to the state judiciary, which it is to control, which is not so entrusted, not so responsible—if the federal court were to exercise, and the state court to ascertain, the federal cognizance: in other words, if the power of expounding were severed from the power of administering a law, and those powers, in their nature inseparable, vested in different and conflicting tribunals.

In the next place, if the state courts are to ascertain the bounds of federal cognizance, all the objects intended to be effected by the establishment of a national judiciary, will be defeated. To secure uniformity of decision in questions of national concernment, obviate the ill effects of state prejudices, in cases wherein they were likely to intervene, and endue the general government with complete independent power, to guard its own constitution, execute its own laws, and enforce observance of its own engagements, and thus preserve the harmony of the system, the peace and tranquillity of the nation: these were the chief objects for which the federal judiciary was provided. [*Federalist*, vol. 2. let. 80. and *Virg. Debates on Const. U. S. art. 3.*] Now is it not plain that uniformity of decision may be prevented, as well by various decisions of the state courts, denying or allowing cognizance to the federal courts, as by various decisions on the merits? that state prejudices may operate as powerfully to induce a denial of jurisdiction to the federal courts, as of impartial justice to individuals? and that these courts can, in no manner, so effectually be prevented from exercising their judicial powers, as by withholding causes from their jurisdiction? Indeed, such a power vested in the state courts, would impair, almost to annihilation, that portion of the efficiency of the general government which it derives from its judiciary. A law of the union, unpopular and odious in any one or more states, would be *there* wholly, or which is worse, partially, in operation: for the state judges would, in all likelihood, participate in the prevailing sentiment of their own state, and would, therefore, be little disposed to tolerate, if they were competent to prevent, the execution of measures they abhor. Reasons, plausible to the world, and convincing to minds at all inflamed with party spirit, would never be wanting, to justify a denial of the jurisdiction of the national tribunals to execute an offensive act of congress; such as its unconstitutionality, its inapplicability, or the like. There is a propensity, in this country, to condemn as unconstitutional those measures of the general government that are disapproved as impolitic; and the state courts would have little hesitation in deciding, that the federal

courts have no power to execute an unconstitutional law. Had the state courts possessed and exercised such a power, the history of this government, from its foundation, would have abounded with instances to illustrate this argument; of which, I dare say, every great state, would, sooner or later, have exhibited its full proportion. [Here the counsel mentioned some recent and some more ancient occasions.] If the Supreme court of the *United States* administer the laws of the union, in the last resort, we shall at least have a judicial, in place of an executive execution of them; we shall have uniformity in their operation, and one reason, exclusively applying to the federal judiciary, to hope that they will be justly administered; the *federal judges* are directly responsible for the mal-administration of them.

If, as the judicial act of congress supposes, the cognizance of the federal and state courts be in most cases concurrent, and where concurrent, the former may constitutionally exercise appellate jurisdiction over the latter; then, so far, the federal and state courts form one system of judicature. It must be so in the nature of things; they are to adjudge the same question, between the same parties, in the same cause, touching the same subject matter. This court holds it wise to avail itself, as far as it may, of the wisdom of foreign jurisprudence: but the government of the *United States* presents a combination of political principles altogether singular: therefore, no exact analogy from foreign judiciaries can be adduced. An appeal lies from the *Irish* court of King's Bench to that of *England*, and from the *Irish* chancery [1 *Bl. Comm.* 104. 3 *Ibid.* 44. 410.], and from the *Scotch* lords of session, to the *British* house of lords. I discern not how the diversities between their political systems of union and ours, can materially affect the analogy between our judicial system and theirs: but of that the court will judge. There can be no doubt, however, that the *Scotch* and *British* tribunals, in the one instance, and the *Irish* and *British* in the other, are by them regarded as forming one system of judicature. So the federal and state courts, where their cognizance is concurrent, and that of the former appellate, are to be re-

garded as "one whole." I borrow the phrase, as well as the doctrine. [*Fed. vol. 2. let. 82.*] If true, surely it belongs to the federal (i. e. the superior), and not to the state (i. e. the inferior) court, to judge, in the last resort, of the appellate jurisdiction of the former. It is incident to the very nature of a superior appellate jurisdiction. So an appeal lying, in certain cases specified by statute [*27 Eliz. c. 8.*], from the King's Bench to the Exchequer Chamber, in *England*, neither the King's Bench to which the writ of error lies, nor the Chancery from which it emanates, but the Exchequer Chamber, determines its own jurisdiction. [*Loyd v. Icut, Doug. 350. n. 91.*] So the *British* house of lords determines its own jurisdiction over the *Scotch* [*Greenshields v. lord Provost of Edinburgh, Colles' Parl. Ca. 427.*] and *Irish* [*Belsham's Hist. of G. Britain, book 7.*] courts. So, also, our court of Appeals determines its own jurisdiction. The case of *Bedinger v. the Commonwealth* [*3 Call, 461.*] is not authority, unless it be the province of this court to decide, whether it can entertain criminal jurisdiction, and whether a case be civil, and therefore within, or criminal, and therefore without, its jurisdiction. Why should the doctrine hold in regard to the state appellate court, and not in regard to the federal? Because the jurisdiction of this court in general, and that of the Supreme court of the *United States* is limited? No: this is also a court of limited jurisdiction, in many respects; limited certainly to civil causes. Because the state courts, over which the Supreme court of the *United States* is to exercise appellate jurisdiction, are themselves supreme sovereign courts, whereas the courts over which this court holds such jurisdiction are not sovereign? No: for, 1st. In respect to cases in which the Supreme court of the *United States* has jurisdiction over this court, this is not a sovereign court: and, 2dly. As to cases in which no appeal lies to this court from the other state courts, the latter are the sovereign courts; the General court, for example, is our supreme criminal court.

The right claimed for the Supreme court of the *United States* to ascertain its own cognizance is analogous to other parts of the federal system. For instance—the militia is not

taken out of the hands of the state governments: the general government is only authorized to call it forth, "to execute the laws of the union, suppress insurrections, and repel invasions." The state judges are still the guardians of the personal security of the citizen; but the general government may suspend the writ of *habeas corpus*, "when, in cases of rebellion or invasion, the public safety may require it." But who is to judge of the occasions, on which the militia may be constitutionally called out, or the *habeas corpus* suspended? The general government. The judicial power of the union is indeed limited; but who is to judge of the occasions on which it may rightly be exercised? The national judiciary. In truth, whenever power is vested in a government or a court, those in whom it resides are necessarily made judges of the rightful exercise of their authority; subject to the correction of an umpire, if one be provided; if not, to the responsibility attached to their office.

If it be objected, that if the federal court is to judge of its own jurisdiction, it may deprive the state courts of all jurisdiction, one answer is, that, *e converso*, if the state courts are to determine such questions, they may destroy the federal cognizance. This is reasoning from the possible abuse of power, not against the expediency, but against the fact, of a grant thereof. The true constitutional answer to all such objections, is, the responsibility of the judges; and as the federal judges are impeachable by the representatives of the people, and triable by those of the states, there is little danger of their encroaching on the exclusive jurisdiction of the state courts.

Let it be considered, also, that this right of the Supreme court of the *United States* to ascertain its own jurisdiction, has been exercised and acquiesced in from the very foundation of the government. In *Chisholm v. Georgia* [3 *Dall.* 419.], the great principle of state suability was asserted; some thought, erroneously; others, that if rightly, such a jurisdiction ought to be abolished; and, therefore, the constitution was *explained* [*Amend. Const. U. S.* 11. *which is declaratory*]; but the competency of the Supreme court to decide that great question of

jurisdiction was never doubted. In *The United States v. Peters* [5 Cranch, 382.] (*Olmstead's case*), the Supreme court held, that it was its peculiar province to judge of its own jurisdiction, and that it had cognizance of that case; while the state of *Pennsylvania* declared, by statute, that the jurisdiction claimed was unconstitutional, and required her executive to resist its decree by force: the court prevailed, at last, and by the strength of truth alone. There are many other cases, brought from various quarters of the union, and decided at various periods, in which the Supreme court of the *United States* has exercised this right of determining its own jurisdiction; as often, by the way, disallowing as asserting its cognizance. [*Olney v. Arnold*, 3 Dall. 308. *Matthew v. Zane*, 4 Cranch, 382. *Smith v. Maryland*, 6 Cranch, 286. *New York v. Connecticut*, 3 Dall. 3. *Strawbridge v. Curtis*, 3 Cranch, 267. *Gordon v. Gladcleugh*, *Ib.* 268. *Montalet v. Murray*, 4 Cranch, 47. *Diggs v. Wolcot*, *Ib.* 179. *Owings v. Norwood*, 5 Cranch, 344.] Hence we may gather the general judgment of the *American* public, and especially of the state authorities. I have met with but one solitary opinion of any state court, that it is not the right of the federal judiciary to ascertain its cognizance; an opinion which it behoves me to treat with high respect. In *Respublica v. Cobbett* [3 Dall. 274.], chief justice *M^cKean*, of the Supreme court of *Pennsylvania*, is reported to have held, generally, that in questions between state and federal cognizance, the constitution of the *United States* has provided no umpire; that the state and national judiciary have each equal right to decide; that this is a *casus omissus* in the constitution; and that an extraordinary tribunal ought to be established, to adjust such questions. Now, 1. This opinion, if meant to be general, was so far extrajudicial; for the case was, an application to the state court, to send a cause, before judgment, to the Circuit court of the *United States*, so that no collision of opinion, as to cognizance, could arise between the two courts, since, in such a case, by the judicial act of congress, the federal court exercises no judgment whatever [*Laws U. S. 1 Cong. 1 Sess. c. 20. § 12.*]; and besides, it was a criminal case, arising under the state laws,

and so clearly belonging exclusively to the state tribunals.—
 2. This *dictum* is incompatible with another position, asserted in the same opinion; that is, that the federal and state governments constitute *one complete system*. 3. Although it be nowhere expressly provided by the constitution of the *United States*, that the federal judiciary shall control that of the states, in questions of jurisdiction, yet it is to be inferred (as I have endeavoured to show), from those parts of the constitution that relate to the judiciary, and to the supremacy of the federal institutions, taken together. 4. The state of *Pennsylvania* has since, in *Olmstead's* case, acquiesced in a decision directly contrary to that of her chief justice. That state, shortly after the dispute in *Olmstead's* case, proposed an amendment to the constitution of the *United States*, to provide an impartial tribunal, to decide disputed points of jurisdiction between the state and national judiciaries; on which the general assembly of *Virginia* solemnly resolved, that no such amendment is necessary or proper; and that the Supreme court of the *United States* is and ought to be the constitutional tribunal to determine all such questions; sustaining me in the whole course of my argument on this head. [*Resolution agreed to by both houses, Jan. 26, 1810. 2 vol. Rev. Code, Supplement. p. 150.*] I have not had the means of knowing what reception the proposal met with in other states. It was deemed of so little moment that it is already almost forgotten.

If I have established this preliminary point, that the question belongs to the Supreme court of the *United States*, and not to this court, there is an end of the debate. In *Smith v. Maryland*, the Supreme court has directly decided the point of law [6 *Cranch*, 286.]; and from *Laird v. Stuart*, we may learn how it would decide the constitutional point. [1 *Cranch*, 309.] It has actually decided this case itself.

But my duty requires that I should meet the questions, suggested by the court, respecting the constitutionality and legality of the jurisdiction exercised in this case.

Is the judicial act of congress, giving the Supreme court of the *United States* appellate jurisdiction over the Supreme state courts constitutional?

Let the constitution and the law be compared [*Const. U. S. art. 3. § 2. Laws U. S. 1 Cong. 1 Sess. c. 20. § 25. vol. 1. p. 63.*]; and it will be seen that the law abridges the federal cognizance, which the constitution would authorize. The *constitution* gives the national judiciary cognizance in all cases, arising under the constitution, laws, and treaties of the union, whether its interference be *necessary* or *not* to support the authority of the federal institutions; but it is only when *necessary* for that purpose that the *law* gives the Supreme court of the *United States* appellate jurisdiction over the state courts. The *constitutional* jurisdiction of the national judiciary depends, in some instances, on the *character* of the *parties*, and in others, on the *nature* of the *cause*, and extends over *cases* of every description, if the character of the parties, and over *persons* of every description, if the nature of the cause be such as bring them within the federal cognizance. The *law* gives the Supreme court appellate jurisdiction over the state courts, only in that class of cases, in which federal cognizance is derivable from the nature of the cause; and not then, unless the character of the case, of the decision, and of the court which renders it concur: the subject in litigation must exceed a given value; the decision must be of the highest state tribunal; and it must be against the authority of the federal institutions, or claims set up under them. Therefore, as to the *extent* of the jurisdiction of the Supreme court of the *United States*, as by law defined, the law, narrowing the constitutional limits of federal cognizance, is clear of constitutional objections.

But the doubt may be, if the federal cognizance may be constitutionally exercised in this appellate form.

I have always thought that this form of federal jurisdiction is the most favourable to the authority of the state courts, that can be devised; following the opinion of Mr. Pendleton, [*Virg. Debates, edit. 1805. pp. 367, 389.*] and the reasoning of Publius. [*Fed. vol. 2. let. 81, 82.*]

The words of the constitution, in fair and natural construction, authorize congress to give the Supreme court appellate jurisdiction over the state tribunals. "In all cases affecting

ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the Supreme court shall have original jurisdiction; in all the other cases before mentioned, the Supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as congress shall make." Now, pretermittting the argument, which might be drawn from the broad power given to congress, to qualify and regulate, according to its wisdom,—in other words, to mould into convenient form,—this appellate jurisdiction of the Supreme court; I see not how the words quoted can be satisfied, but by extending that jurisdiction over every court, in which any of the cases referred to, as "cases before mentioned," may arise. The "cases before mentioned," are, "all cases arising under the constitution, laws, and treaties" of the union, &c. no matter in what court arising, state or federal; and if the Supreme court is not to have appellate jurisdiction over such of the cases specified, as may arise in the state courts, it will not have jurisdiction in *all* those cases. It cannot be said that the effect of the words quoted is to fix the relation between the Supreme and the inferior federal courts, and not between the former and the state tribunals also, unless it can be shown that the federal cognizance is exclusive of that of the state courts.

I need not inquire how large a portion of jurisdiction such a construction would take from the state courts, nor represent the extent of encroachment on federal cognizance, of which, upon that construction, the state courts have all along been guilty.

The constitution no where declares, that the federal cognizance shall be exclusive in any case: it provides that the federal cognizance shall *extend to*, not that it shall *appropriate*, the cases therein described. There are cases, indeed, which, from their nature, exclusively belong to the national tribunals; cases purely national; cases, for instance, of admiralty and maritime jurisdiction; a class of cases readily distinguishable. Such cases excepted, in all the other cases of federal cognizance, the state and federal courts have concurrent jurisdiction.

It has never been supposed that the powers of any department of the general government are exclusive of the state authorities, unless in their nature exclusive, or so expressed to be. Does the grant of power to congress to lay direct taxes exclude the state governments from the right of direct taxation? If the mere grant of powers to the general government were an exclusion of concurrent powers in the state governments, why that section of the constitution, expressly prohibiting the states from a concurrent exercise of some of the delegated powers? [*Const. U. S. art. 1 § 10.*]

Every object of establishing a national judiciary requires that the federal cognizance,—with the exception above stated,—should be concurrent with that of the state courts; and where concurrent appellate. If it were exclusive, there would be no relation whatever between the national and state tribunals; therefore no mode by which the former could prevent the intrusions of the latter; and this anomaly might occur, that various sovereign courts might decide the same cause, at the same time, and rightfully,—in a legal view, as there would be no remedy,—enforce opposite judgments of the same matter. If the jurisdiction were concurrent, and the federal appellate jurisdiction over the state courts were taken away, then there would be as many sovereign courts as states, without relation or obligation to one another, each to decide, in the last resort, on questions in which the whole nation have equal concern.*

It may be objected that, as the whole judicial power of the union is vested in the federal courts, and the judges thereof are to be commissioned and sworn, &c. the state judges, not being so qualified, cannot exercise the inferior federal cognizance. But, if the federal and state cognizance be concurrent, the state judges are only exercising state cognizance, while the cause remains with them.

Have not the courts of *Virginia*, in effect, acquiesced in the constitutionality of this appellate jurisdiction of the Supreme

* See opinion of chief justice *Tilghman*, of *Pennsylvania*, *ex parte Lockington*, on a *habeas corpus*, delivered November 22, 1813. 5 *Hall's Am. Law Journ.* 92. 301.

court of the *United States*? The conscientious opinion, I believe, of every judge in the commonwealth, except chancellor *Wythe*, was, that such *British* debts as had been paid into the treasury, according to law, were not recoverable of the original debtors. The federal court determined otherwise; and our courts all, immediately and invariably, conformed to that precedent. Why, if it were not authoritative! Why authoritative, if the Supreme court had not that appellate jurisdiction now called in question? The court remembers the opinions of the judges of those times, and knows, better than I, how far I am upheld by their authority.

A main objection to this appellate jurisdiction will be, that it impairs the state sovereignties. But that is an objection, not to the constitutionality of the judicial act, but to the constitution of the *United States* itself; and not to the institution of the judicial department only, but to the whole system. It is the existence of the federal cognizance at all, and not the form in which it is exercised, that impairs the state sovereignties. Surely these are as much impaired by the transfer of a cause from a state to a federal tribunal, *before* as *after* judgment rendered: yet this court saw no constitutional difficulty, or state degradation, in the former case. [*Brown v. Crispin*, 4 *Hen. and Munf.* 173.) The states have surrendered to the general government the highest attributes of sovereignty; and the federal power, acting in its sphere, is expressly made paramount and supreme, capable to control the state authorities, legislative and judicial. Happy for the union, if the pride of state sovereignty could abate, in some proportion to the diminution which the substance has undergone!

Recollecting when, and by whom, the judicial act was passed, no answer can be more reasonable and apposite to the objections now made to its constitutionality, than that of the Supreme court, in *Laird v. Stuart* [*cited supra*], to another objection to the constitutionality of the same law. "To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under 'the law,' for a period of several years, commencing with the organization of the judi-

cial system, affords an irresistible answer, and has indeed, fixed the construction. It is a contemporary construction of the most forcible nature. This practical exposition is too strong to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed."

Supposing the judicial act constitutional, does it give the Supreme court of the *United States* appellate jurisdiction of the present case?

The cases of *Owings v. Norwood*, and *Smith v. Maryland* [cited *supra*] exhibit the opinion of the Supreme court on points of jurisdiction like the present; its reasoning on the subject; and the line of demarcation which it has drawn between its own and the state cognizance.

This is a case within the appellate jurisdiction of the Supreme court, as by law defined, according to the plain words of the law; it is a case, "where is drawn in question, the construction of a clause of a treaty of the United States and the decision" of the state court, "is against the title, right, privilege and exemption, specially set up and claimed, under such clause, of such treaty, by one of the parties." [*Laws U.S. 1 Cong. 1 Sess. c. 80. § 25.*]

I yield every possible advantage, when I consent to take the character of the cause, of the claims of the parties, and of the decision from Mr. Munford's report; [*1 Munf. 218.*] for it is there only we find the point on which this court concurred in deciding the case: whereas it was the record alone, which the Supreme court could regard, in revising the judgment. The treaty of peace of 1783, is expressly found as an essential part of the case. One party contended, that, owing to the situation of the property in dispute, and to the alien character of *Fairfax's* devisee, the treaty did not protect his claim; and that, at any rate, this right was released by the act of compromise: [*2 Rev. Code, app. No. V. p. 71, 2.*] the other party insisted, that the treaty did apply to the case; that it did protect the claim; and that the act of compromise, being no part of the record, could not affect the question. The court proceeded to consider the meaning, effect, and application of the treaty. One judge said

in effect, that the construction of the treaty, came necessarily to be considered and determined : he adopted a former extrajudicial opinion on the same clause of the treaty, in order to make it judicial : and he decided, that the treaty did not apply to the case, by reason the alienage of the claimant, which the treaty was not intended to obviate ; of the previous confiscation of the subject, which anticipated the treaty ; and of the act of compromise, by which *Fairfax's* claim, if any rightful claim he had, was released. The other judge also entered into an examination of the treaty ; differed from the first, in regard to the confiscation of the subject, and the meaning and operation of the treaty itself ; but agreed, that its operation on the case, was avoided by the act of compromise. One judge, then, thought the treaty had no operation on the case, on account of matter precedent, matter intrinsic, and matter subsequent ; the other on account of matter subsequent only : but both decided against its operation. Clearly, here was the construction of a treaty drawn in question ; a claim set up under it ; and a decision against that claim. Nor can it be material to the present question, *why* it was so decided, since it is the *judgment* itself, and not the *reason* of it, which an appellate court is to review.

1. If it should be objected, that the decision of this court was not against the *validity* of the treaty, and so no need for federal cognizance to interpose, to enforce the national engagement : I answer, there is ground enough for the appellate jurisdiction of the Supreme court, if the judgment of this court were against the claim set up under the treaty. 2. If it should be objected, that in this case it was held, that the treaty was *inapplicable*, so that it was not a case arising under the treaty : I say, the objection is founded on a *petitio principii* ; for the whole question, in both courts, was, did the treaty apply or not ? The objection presumes, that the Supreme court decided erroneously ; but to decide erroneously, and to decide without competency, are different things. 3. If it should be objected, that the treaty came only *incidentally* into question, and formed but a *part* of the case : The opinions of this court demonstrate,

on the contrary, that it came directly and judicially into question. The federal institutions can never form the *whole* of any judicial case; which must be one of individual rights and claims. To form a judicial case, under the constitution, laws, or treaties of the Union, there must be some fact, on which they may operate, as a commission, a grant, a contract, or the like. No one ever doubted, that the case of British debts, was a case under the treaty; yet the debt formed only *part* of the case. 4. If it should be objected, that this case was decided under the act of compromise of 1796, [*cited supra*] and so was a case under the law of Virginia, not under the treaty: With great deference to the judges, who decided the cause here, I must contend, that that act forms no part of the case. It appears not in the record; it is not even alluded to; it was impossible it should be, as the case occurred before the act was passed. It is a private act, in the strictest sense; such as in England must be pleaded. [1 *Black. Comm.* 85, 6. 2 *Ibid.* 344, 5, 6.] The law of Virginia, that private acts may be given in evidence without being specially pleaded, [1 *Rev. Code*, c. 76. § 80. p. 112.] merely dispenses with the pleading, but does not change their character as facts, so that the court can take notice of them, unless they are found on the record; and, if the court could properly take notice of this private act of assembly, the act of itself works no effect on the rights of either party. It is a contract; an executory, conditional contract; to be perfected by a deed of release, afterwards to be executed by the claimants under *Lord Fairfax*; and it is under that deed that *Hunter* must claim, if he claim under the compromise at all. Now, certainly, the deed is matter in *pais*, which must be found in the record, before the court can judicially take notice of it. Nay, if the act of compromise, and the deed of release executory thereof, had been part of the record; even then, it would have been a case within the appellate jurisdiction of the Supreme court; for it would still have been a question to be decided, whether, the compromise embraced the case, or not; and if not, the old question would recur upon the construction of the treaty: for

illustration of which, I again refer to the case of *Smith v. Maryland*.

I have only to add—in regard to the two cases, alluded to by *Roane J.* [1 *Munf.* 232.] as cases in which the claimants under *Lord Fairfax*, availed themselves of the act of compromise, to reverse judgments in favor of the commonwealth, in October 1798—that it is manifest, on examination, that the orders therein were entered by consent.

Williams, contra. I shall consider the question under two general heads:

1. Whether the words of the constitution give congress the power to vest by law in the Supreme court a jurisdiction, in this case, by way of appeal, or writ of error.

2. If they be sufficient to give such power, whether this case is in fact embraced by the 25th section of the Judicial Act, as it is generally called.

In considering the first question, I will consider as well the construction of the constitution, as the proper court to decide it; in reference to this court, or the court of the *United States* claiming the jurisdiction of revising its sentence.

The first point to be discussed is, which is the proper tribunal?—for, if it be true that the Supreme court of the *United States* is the tribunal, this court has nothing to do with the subject. This renders it necessary to define the nature and relative powers of the two governments.

The mandate directs this court to register the sentence of the Federal court reversing the judgment of this court, and to carry the judgment or sentence of that court into execution, or cause it to be done.

If this court, as is contended, has nothing to do with the question, but is bound to register the sentence, it is indeed, no more than a puppet to be played off by the Supreme court of the *United States*.

If, on the contrary, it is to act on the subject as a judicial tribunal, it must consider and see whether that court has the power to issue the mandate. If the Supreme court orders you

to do an act not authorized, but plainly prohibited, by the constitution, it is your duty to refuse:—for you, as well as they, have taken an oath to support the constitution of the *United States*.

It is said, however, that the judicial power of the *United States* is by the constitution vested in *their* courts, and as that power involves the construction of the constitution and laws of the Union, the Supreme court alone has the authority to decide.

This is begging the question.

It is to decide upon state authority.—Suppose congress should pass a law giving an appeal from the State to the Federal court in every case;—the Supreme court should decide that it had jurisdiction under such law;—should thereupon, reverse a case upon contract between two citizens of Virginia decided here, and send a mandate to this court to register and carry into effect such sentence of reversal;—would this court be bound to obey it?—If that court alone is competent to decide upon the extent of its own jurisdiction, this court could not refuse;—and yet obedience to the mandate would be a direct infringement of the constitution! If on the contrary, this court would, in that case, have the right to refuse obedience, it must be because it possesses the right to examine the question.

It may be objected that the case supposed is an extreme one; and therefore, that the point in controversy should not be tried by it. It is equally fair, on my part, to try the question by an extreme case in relation to the Supreme court, as it was in *Mr. Leigh* to draw an opposite inference from the extreme case of a wilful violation of the constitution by the state judges.

But upon all constitutional questions, an extreme case is proper to try a subject by;—for the violation of the constitution must pre-suppose an assumption of power; and checks are established for the purpose of preventing it; and that construction which takes away the check is wrong. Now, if the Supreme court have no check but their own opinion, they may

be guilty of this supposed extreme case; and so may the congress.

It is said that, to prevent this, the federal judges are liable to impeachment. So, I answer, are the state judges.

Prior to the adoption of the present constitution of the *United States*, the several states were sovereign and independent, and all administrative authority was vested in the state governments. When that instrument was adopted, the people distributed the administrative authority, or government, into two distinct branches, internal and external:—the former, with some few exceptions, they confided to the state sovereignty;—the latter to the general government. The portion allotted to the latter was for the purpose of a *federative* government. The people, however, anxious to limit the new jurisdiction, and to take from it constructive powers, declared that all powers not delegated to the *United States* by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. Yet if the federal judiciary is alone to decide, in exclusion of state authority, it results in effect, that all the constructive power, intended to be prohibited, is in fact given. That cannot be the rule; but where the question is whether a case be proper for state authority, the state judiciary must necessarily decide.

But it is objected,—if this were to be tolerated, and the judiciaries of the states to decide, it would result in overturning all the objects of the framers of the constitution, and result in contradictory decisions; whereas, if the power of deciding be given to the federal judiciary, the decisions would be uniform. To prove this doctrine correct, as well in practice as theory, the second volume of *The Federalist* (letter 80, pages 303, 4, 5, 6.) is referred to. I deny the *authority* of that book. It was written by three persons to induce the people to yield to the general government certain powers: and their expositions of the constitution were merely their individual opinions. We know, too, that one of those individuals admitted in the Virginia convention, that the system was de-

fective, and concurred in amendments which I shall presently notice.

These newspaper essays were party writings intended to induce a sentiment favourable to the ideas of the writers. But this same *Federalist* [vol. 2. p. 74.] tells us that in case the federal government should exercise powers not warranted by the constitution, and to the prejudice of an individual, the remedy is to be by application to *that* judiciary to which cognizance of the case properly belongs;—if to the injury of the state, then the state legislature is to sound the alarm:—thereby admitting, at any rate, a possible case of usurpation, and that the application for redress was to be, not to the federal judiciary only, but to *that* tribunal, whether state or federal, which had properly cognizance of the case.

Again, these letters were written prior to the adoption of the constitution, and laid down constructions of it which many considered as dangerous to the sovereignty of the states, and tending to introduce a consolidated government. The conventions, alarmed at that power which was limited only by vague and indefinite expressions, and warned—at least in Virginia—by some very great men, of the consequences of constructive powers, adopted the precaution of proposing amendments, which being adopted, cut up by the root the favourite idea of constructive powers, and with it many of the constructions put upon the constitution by the *Federalist*.

The rule, under the constitution, with the amendments, is that the powers delegated to the federal government are, in all cases, to receive the most strict construction the instrument will bear, where the rights of the states, or of the people, either collectively or individually, may be drawn in question. [Tuck. Bl. app. p. 154.] The form of the ratification by the convention of Virginia also shows their ideas upon the subject. [Ibid. app. p. 160.]

Having said so much of this new authority, and shown it was written upon a different system than the one now prevailing, I will leave the trio to their fate.

But my ideas are said to be calculated to overturn the great objects of the framers of the constitution.

What the constitution *ought to be* is not a proper argument to be addressed either to this or the United States' court.—

What it is, is the present inquiry. Constructive powers are prohibited:—those conferred must be *express*, before the federal judges can take cognizance; and the expediency of uniformity of decision will not give them the power, unless the constitution gives it.

I will agree with Mr. Leigh in one thing—that no country has produced a system like ours; and therefore analogies are not to be found.

As to the cases from *England*, they are upon positive regulations. As to *Ireland*, they are founded on the principle that the King's Bench of *England* is the king's own court, in which formerly he sat; and consequently, by the royal prerogative, that court, in the plenitude of its power, is considered as having the appellate power to reverse the decisions of the Supreme court of *Ireland*. As to the writ of error from parliament to *Scotland*, that was given by the act of '6 Ann., which established a court of Exchequer in *Scotland*. By the articles of union it was provided that the *Scottish* courts should remain; subject, nevertheless, to such regulations as should be made by the parliament of *Great Britain*.

I will not stop to inquire how far the decisions of the Supreme court upon this subject are to be the rule. If they are the sole judges, there is an end of the question.

But it is said, if you can refuse to register this mandate, so may the state executive disobey the president's orders upon a call for militia.

By the terms of the constitution [art. 1. sect. 8.] congress has expressly the power to provide for calling forth the militia, to execute the laws of the union, suppress insurrections, and repel invasions.

The governor of a state is not called upon in a judicial character to do any act, but as a militia officer, and, if he refuses, is liable to punishment:—but, if he will, he may refuse;

taking upon himself the responsibility for so doing—in like manner as the president, upon his responsibility, may omit to call out the militia when he ought. But suppose the president to call out the militia, in time of peace, to be marched into a foreign state, would it not be competent for the state authority to refuse obedience?

Mr. *Leigh* says that congress may suspend the writ of *habeas corpus*, under certain restrictions; and, as to the propriety of the case, the *United States'* judiciary alone is competent to decide.

This is really begging the question:—it is taking that for granted which is to be proved. My idea is that, if a citizen of *Virginia* was confined improperly under such law, the state judiciary would have authority to release him.

He says, too, that where the power is lodged, there is the authority to decide.

This, again, brings us back to the inquiry, where the power *does* reside.

The state judges, he contends, may be carried away by their feelings. It is admitted, they may be so misled; but there is as much cause to apprehend that the judges of the courts of the *United States* will be so carried away as the state judges.

But, if I am right, the *constitution* must decide the true tribunal. The judicial power is defined by the constitution, art. 3.

This court is certainly not contemplated by that article, notwithstanding the great authority of Mr. *Pendleton*.

The judges of this court, as individuals, and, if Mr. *Leigh* chooses, as a court, sustain a two-fold political capacity—one in relation to the state—the other in relation to the *United States*. In the latter, the only measure of their power is afforded by the constitution, for all authority in the government of the *United States* is derived from that instrument. This is proved by the constitution, as it originally stood, and the amendments to it before noticed.

Now the third article declares that the judges there contemplated shall hold their office during good behaviour, and, at

stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

By the second section of the second article, these judges, contemplated by the constitution, are to be appointed by the president, by and with the consent of the senate.

In addition to this, the General court of this commonwealth, at their last session (ten judges on the bench), determined that they had no right or authority to execute the criminal laws of congress, in the case of *Fachy*.

I may then, I think, question the correctness of that great man, Mr. *Pendleton's* authority, on this particular point.

This court, by the constitution, is to decide upon the laws of congress, not as a subordinate tribunal, but as the court in the last resort of a sovereign state. -

The whole judicial power of the *United States* is confined to the Supreme court, and such inferior courts as congress may ordain and appoint.

I have already endeavoured to show that the *state* judiciary is no part of that system.

But it is said that our construction leads to civil discord, and therefore this court should extend the constitution, and thereby give the Supreme court the control, or, rather, should not inquire into the question, but blindly submit!—If the constitution does not authorize the exercise of the power, to attempt it is usurpation. The doctrine contended for, then, would go to prove that all usurpation must be submitted to, for fear of civil discord; and thus would change the whole character of the constitution, by conferring the general power on the *United States*, and applying the restrictive clauses to the state.

This is to make a new constitution—not support the old.

But the cases of British debts and payments into the treasury have been relied upon as proving that the federal courts have the authority now in question.

The jurisdiction which the federal courts have taken in those cases has been original, the plaintiffs being aliens,—and not appellate from the state courts.

The state courts have adopted their decisions on those points, not because the federal courts had appellate jurisdiction, but because they thought the principles properly decided—in the same manner as this court adopts a decision of a *British* court, when not *authority*.

But, says Mr. *Leigh*, if the courts of the *United States* have jurisdiction as original tribunals, there is no reason why they should not have it by appeal.

This might be a sound argument, if the people of *America* wished to give them the jurisdiction, to be addressed to the proper authorities to amend the constitution. But if the constitution does not *now* give it, this court is bound, by its duty to the state authority, to refuse it; for it has not the power to confer jurisdiction.

But “this court, in the case in 4 *H. and M.* 173, admitted the right of the defendant to remove his cause from the state court to the Circuit court of the *United States*.”

I answer that the jurisdiction exercised in that case was not appellate, but original. The cause was not removed into the Circuit court, on the ground that that court was superior to the state court. Whether it was right or wrong is unnecessary for me to inquire, as it has no bearing on this case.

It is objected that the judicial act of congress, as also the opinions of the *Federalist*, were contemporaneous expositions of the constitution; and this by the very framers of the instrument.

I admit that the judicial act may be said to be a legislative exposition of the constitution; but while it is entitled to respect as the *opinion* of the legislature, it certainly is not, on that account, to be implicitly obeyed by the judiciary. Soon after the adoption of the constitution, a law was passed, making it the duty of the judges on the circuit to examine pensioners, &c. That law the judiciary of the *United States* decided to be unconstitutional.

Besides, at the time the judicial act was passed, the amendments, which have excluded constructive powers, were no part of the constitution.

"Having parted with our sovereignty, we should part with our pride!"—Agreed!—so far as we *have* parted with our sovereignty; but that is the question.

II. The second point to be considered is, if congress have the power contended for, is this a case within the provisions of the 25th section of the judicial act.

If it be such a case, it is admitted that it must appear so from the character and decision of the cause. The only questions which, under that act, can be re-examined by the Supreme court, are such as appear *on the face of the record*, and immediately respect the questions of validity or construction of the constitution, treaties, statutes, commissions, or authorities of the *United States*, in dispute in the cause.

Now the case before us was not decided upon any such point, but under the compromise. I will not inquire whether that compromise was properly before the court. This court settled the question, upon solemn argument; and it must be considered as properly settled, unless it be now competent for the court to reverse that decision.

If this be true, as it certainly is, the decision was not, in the language of the act, "against either the validity or construction of the treaty;" but upon a totally different point.

But it is contended that the treaty is part of the case agreed; and that, although this court should decide, or profess to decide upon a different point, yet as the treaty is found as a part of the case, the appeal lies; and that a contrary rule would put the federal judiciary in the power of the courts of the state. But, if the federal judges are authorized to hold jurisdiction, because the treaty is in the case, though not affected by the decision, it is to put the state judicatures completely in subordination to them.

The act of congress has declared the only case; and this is not that case. The federal court can hold jurisdiction upon that ground alone;—and although this court may have decided improperly under the compromise, it is not competent for that court to correct its error.

Wirt. The doubts of the court resolve themselves into two questions:

1st. Whether it appears by the record, that this case is one of those in which appellate jurisdiction is given to the Supreme court of the *United States* by the 25th section of the judicial act of congress.

2d. If it be, whether that section, itself, be constitutional.

As one of the counsel of Mr. *Martin*, in favour of whom the decision of the Supreme court of the *United States* has been pronounced, I hold the affirmative of both these questions, and claim the registration of the mandate: And I shall proceed to examine the questions in the order in which they have been presented by the court.

1. The 25th section provides, "that a final judgment or decree in any suit in the highest court of law or equity of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the *United States*, and the decision is against the validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the *United States*, and the decision is in favor of such their validity, or where is drawn in question the construction of any clause of the constitution, or, of a treaty, or statute of, or commission held under the *United States*, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the Supreme court of the *United States* upon a writ of error, the citation being signed, &c." "But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute." [*Laws United States*, vol. 1, p. 63. § 25.]

By this section it is clear that appellate jurisdiction is given to the Supreme court of the *United States* in three classes of cases touching treaties: to wit,

1. Where the validity of a treaty is drawn in question, and the decision is against its validity.

2. Where the validity of a state law is drawn in question on the ground of its being repugnant to a treaty; and the decision is in favour of the state law.

3. Where the construction of a treaty is drawn in question, and the decision is against the right set up, under the treaty.

Having thus ascertained the cases in which appellate jurisdiction is given to the Supreme court of the *United States* by the act in question, the only remaining inquiry under the first head, is whether the record before us presents either of these cases.

On inspecting the record, we find, that this was an action of ejectment brought by *David Hunter* against *Denny Fairfax* in the district court of *Winchester*, to recover a tract of land lying in that part of Virginia called the Northern Neck. The record presents a case agreed between the parties, and submits the law of the case so agreed to the judgment of the court. The facts agreed in behalf of *Fairfax* the defendant are, in substance these:

1. The title of Lord *Fairfax*, under whom the defendant claimed.

2. The devise of that title to the defendant by the last will and testament of Lord *Fairfax*, in 1781, and

3. The treaty of 1783 between Great Britain and the United States.

In favour of *Hunter* these facts were agreed:

1. That *Denny Fairfax*, the devisee of Lord *Fairfax* was an alien: a native subject of the king of Great Britain at the time of the devise and at the time of the trial.

2. The several laws of escheat and confiscation of the state of Virginia.

3. The several laws by which this state provided for granting, as waste and unappropriated, the ungranted lands in

the Northern Neck, of which the lands in controversy were part.

4. The commonwealth's grant of these lands to *David Hunter*, the plaintiff; and

5. The lease, entry, and ouster, in the declaration mentioned.

In settling the law upon this case, what was the court called to consider? In favour of the defendant they were called to consider these questions:

1. Had Lord Fairfax title?

2. Did that title pass to Denny Fairfax by the devise of his ancestor?

This last question divided itself into two others, namely,

1. Was the devise to Denny Fairfax ineffectual on the ground of his incompetency to hold, as an alien and subject of the British king; or

2. Was his title saved and covered by the treaty of peace of 1783.

In favour of Hunter the court were called upon by the case agreed to decide,

1. Whether the treaty of peace of 1783 could be construed as applying to this case; whether that treaty did not merely go to prevent *future* confiscations; and whether a *previous* confiscation had not been effected here?

2. Whether our act of assembly of 1782, confiscating the quit rents and subjecting the land to location, did not supply the place of an inquisition of escheat; withdraw the case from the operation of the treaty of 1783, and give validity to the grant to Hunter? or

3. If the act of '82 did not effect a compleat escheat, whether the act of '85 united with it, did not consummate the escheat, and, of course, the commonwealth's grant to the plaintiff?

4. If the act of '85 was to have any effect in the confiscation, was that act valid or not as being repugnant to the prior treaty? was the treaty to give way to that act, or the act to the treaty?

These are the points on which any court, settling the controversy on the case agreed, would be, unavoidably, compelled to pass; and hence it is clear that all the three cases deduced from the 25th section of the judicial act of congress, as giving appellate power to the Supreme court, appears, by the record, to have arisen in the case at bar.

1. The validity of a treaty is drawn in question, for a posterior act of the state legislature, that of 1785 is relied upon as consummating a confiscation against the faith of that treaty, and the decision of this court was against the validity of that treaty, in this particular.

2. The validity of a state law, that of '85, was drawn in question, as being repugnant to the treaty and the decision was in favour of the validity of the state law.

3. It is most clear that *the construction of a treaty* and its application to the case at bar, was drawn in question, and the decision of this court was against the right of Denny Fairfax, which was set up under that treaty.

This last is, in truth and substance, the whole and sole question raised by the record; for, on the one hand, Hunter did not deny,

1st. The title of Lord Fairfax; nor

2nd. The devise to Denny Fairfax; nor

3d. The treaty of peace.

So on the other the defendant did not deny,

1. That a grant had issued from the commonwealth to Mr. Hunter, nor

2. That this grant had issued under the several laws of the state.

So that the very pivot of the controversy was the protection of the treaty on the one hand, and its non-application on the other. If the treaty, by a fair construction, covered the title of Denny Fairfax, his success was inevitable, for the rest of his title was not controverted. If the treaty did not, by a fair construction, apply to the case, the success of Mr. Hunter was inevitable for the rest of *his* title was not questioned.

So that the clear and single question upon the record was, whether the treaty by a fair construction did apply to the case so as to shield the devise to Denny Fairfax and perfect his title. It is not possible for the human mind to imagine a *route* by which a court could arrive at the decision of the title, put in controversy by this record, without encountering and crossing and settling the construction of the treaty. I answer the question of the court therefore with confidence that this is a case in which it appears by the record, that the application and construction of a treaty were drawn in question, and in which the decision was against the title set up under the treaty.

Mr. Williams, however, objects that the mere finding of the treaty does not by any means prove that the decision turned on the treaty; for there are many other facts found besides the treaty, and he adds that if such a finding would of itself, give the Supreme court appellate jurisdiction, it would be easy to give such jurisdiction in every case—in a common action of assault and battery, for example, it would be only necessary to introduce a finding of the treaty of peace, and the appellate power of the Supreme court would, at once, attach upon the case.

My respect for Mr. Williams will lead me to give this objection a much graver answer than I think it merits; though such is the nature of the objection itself, that even the gravity of an answer becomes, in some degree, ludicrous. The objection proceeds from a misconception of the act of congress, and a misconception of our argument under it. We have never contended that the mere finding of a treaty in a case would, *ipso facto*, found the appellate jurisdiction of the Supreme court; on the contrary we have always said, and so says the act of congress, that the case itself must be of such a character as to draw in question and render inevitable, the application or construction of the treaty so found. Suppose, for example, in an action of detinue between two citizens for a horse; or in an action of ejectment between two citizens of the same state, both claiming under state grants, the carelessness

or artifice of counsel should introduce into a special verdict setting out the titles, the strange and irrelevant fact of the British treaty: neither title being set up under that treaty, nor in any manner connected with it, the question of its application or construction, could not possibly occur, but the decision of the court must, of necessity, stand wholly clear of it: hence in such a cause, the case put by the act of congress of a decision against a title *set up under a treaty*, could 'by no possibility arise. But is the case at bar a case of this character? Is the treaty of '83 an irrelevant fact which has strayed into this cause without having any relationship with, or bearing upon it? No, sir: it is a fact intimately and indissolubly blended with the question of title: it is the very shield of Denny Fairfax, rendering him safe and invulnerable as long as he can stand behind it, and the sole question upon the record is, whether he can lawfully stand behind it. If Mr. Williams will reflect but a moment on the course which the mind of a judge must take to adjust this title on the case agreed, he will perceive how necessarily and inevitably the question of the application and construction of the treaty arose, and how utterly impossible it was to decide that title, without deciding also the question of the treaty.

For example: It was a question of title to lands. Either title in the absence of its rival, was good. The court, therefore, was forced into a comparison of the titles. Either being perfect, by itself, the question must have arisen in the first place as to priority; because between titles equally complete in all other respects, that which is prior is best. In this comparison the title of the defendant must have had the advantage, because the title of Lord Fairfax, under which he claimed, is shown by the case agreed to have been complete, previously to the year 1736, whereas that of the commonwealth, under which Hunter claimed, is shown by the case agreed not to have arisen until after the death of Lord Fairfax in 1781. The defendant thus having the advantage of priority in his favour, it remained to be inquired whether this prior title of Lord Fairfax had been regularly transmitted to him. It is agreed that

Lord Fairfax died in '81, a citizen of Virginia, seized of this perfect title, and that he devised the same to Denny Fairfax the defendant. If this devise were good and effectual to pass the title to the defendant and cause it to abide in him, the deduction of title was complete, and Denny Fairfax occupied precisely the ground of his devisor, holding the prior and paramount title. In trying the efficacy of the devise, it was shown by the case agreed, that Lord Fairfax was competent as a devisor, and that the devise, in itself, was unexceptionable. The contest arose on the competency of the devisee. It was agreed that he was an alien, and therefore under the general law of the land, although competent to take lands by devise, incompetent to hold them; if then being an alien, he could hold at all, it must be on some ground which distinguished him from aliens at large, and the court were to look into the record to see if there were any thing therein which did so distinguish his case. The only facts on the record which could support such a distinction were these: 1. That he was a subject of the king of Great Britain. 2. The treaty of peace of '83 which protected the titles of British subjects against future confiscations. Did the treaty apply to this case and provide for it, was the only remaining question? If it did, there was an end of the cause in his favour; if it did not, his title was gone and that of his adversary stood without a rival. Was then the treaty an erratic and irrelevant fact in this cause? Is it not apparent that it was the very point of collision between the parties, the very *nodus* of the controversy? I can conceive no mode of reasoning more simple and conclusive than this, to show that this is a case in which it appears, upon the face of the record, that the application and construction of a treaty, were drawn in question; and hence, that the cases put by Mr. Williams of a treaty irrelevantly found bear no resemblance to this case, and furnish no inference which can fairly apply to it.

To object that the treaty is not the only fact found in this case, but is merely one of several other findings, would be to require, by implication, a perfect absurdity; for it would be to require that, in order to bring a case within the act of con-

gress, the treaty shall be the only fact that belongs to the cause. Now what sort of an individual controversy would that be, which should consist only of one fact, and that fact, too, a public treaty. The act of congress makes no such impossible and absurd requisition: it does not say that, in all cases in which a treaty shall be the only fact in the cause, the Supreme court shall have appellate jurisdiction; but that it shall have such jurisdiction in every case in which the application or construction of a treaty *shall be drawn in question*. The intention of the law certainly was, that, in all cases affecting a great national compact, and involving consequently the faith, honour, peace, and security of the whole nation, jurisdiction, in the last resort, should be given to the court of the nation. Hence every case, which *draws in question* the construction of a treaty, of how so many other facts that case may be composed, is equally within the intention and the language of the act of congress. But I have shown that, in this case, the treaty is a material link in the chain of the defendant's title: it is that important link, which, passing over the bar of his alienage, connects him directly with the land in controversy. I have shown that it was wholly impossible for the court to trace the title spread upon the record, without noticing the treaty; without entering into an examination of the treaty, and deciding on its application; and hence that this is, emphatically, one of those cases in which it was the *intention* of congress, as it is their *expression*, to give appellate power to the court of the United States.

If the finding other facts, in addition to the treaty, would be sufficient to oust the jurisdiction of the supreme court, then they could take no jurisdiction at all, under the section of the law in question; because every controversy is, and must of necessity be, composed of other facts; it must be composed of the transactions of the suitors themselves, or of those under whom they claim their grants, wills, deeds, letters, contracts, &c. &c.; all of which are facts other than the treaty, and without which other facts no controversy can subsist at all. Hence it must be very clear that, if this objection prevail, the act of

congress, in this particular, is at an end; it can produce no possible effect whatever; since it is impossible, in the nature of things, that any case can arise, on which the provision can be brought to operate.

It is objected by Mr. Williams, nevertheless, that the decision of this court did not turn on the treaty, but on the act of compromise of 1796; and this, he says, appears by Mr. Munford's report of the case. *By Mr. Munford's report of the case!* Is Mr. Munford's report of the case a part of the records? If not, Mr. Williams evades, instead of answering the question put to us by the court. For the question propounded by the court, and propounded, too, by the act of congress, is, whether it appears, *by the record*, that the application and construction of a treaty were drawn in question. Now, what is the record? Certainly the cause as it came up, on paper, from the court below, and as it stood before this court for decision. The arguments of the counsel on that cause, and the arguments by which the court supported their decision, constitute very properly a part of Mr. Munford's report, but certainly constitute no part of the record itself. The act of congress, we have seen, makes *the record* the sole criterion of jurisdiction in this case. The ground on which the Supreme court is to assume jurisdiction must appear *upon the face of the record*. To this single standard they are referred, and they can know nothing judicially of any other. Now, does the compromise, the alleged ground of this court's decision, appear upon the face of the record? Is the fact of the compromise a part of the case agreed? It certainly is not; and that for the best of all reasons—because, at the time when this case was agreed, the compromise did not exist at all. The case was agreed in 1793: the compromise did not take place until 1796; and it took place while the cause was standing in this court on the appeal. The compromise, therefore, did not and could not constitute a part of the record; and therefore cannot, with any propriety, enter into the consideration of the question of jurisdiction before us, which the law declares shall be tested *by the record alone*.

Mr. Williams says he will not stop to inquire whether the compromise entered properly into this court's consideration of the subject or not. He will not stop to inquire! If a gentleman will not stop to inquire into that which forms the very point of inquiry, *it seems to me* (to borrow his own favourite phrase) that the gentleman must be in a most unreasonable hurry. Argument, on such terms, if not a very profitable, becomes, at least, a very cheap business; and has this farther advantage, too, that it requires but a small capital to set up trade. I, who have more leisure on my hands than Mr. Williams, *will* stop to inquire into this point; and I insist that the compromise could not, with any propriety, have entered into this court's decision of this cause; and therefore I am bound, through respect to the court, to insist that it did not so enter into their decision.

To render this point clear, it is but necessary to remember that this court possesses not one atom of original jurisdiction. Its whole power is appellate, and appellate only. Being a court merely appellate, its sole function is to revise the judgments of inferior courts, and to decide upon their correctness. In doing this, you constantly take, and you must take the cause precisely as it stood before the court below. The correctness or incorrectness of the judgment below can only be fairly tested, by comparing it with the identical cause in which it was pronounced. If you vary the cause here, by introducing a new and important feature into it, you are no longer employed in examining the rectitude of the judgment below; for the cause which you are trying is not the cause in which the judgment below was pronounced. To reprove the judgment of the court below as erroneous, on the ground of a fact which did not belong to the cause, and did not even exist at the time, would be a *bouleversement*, an anachronism, a sort of judicial hypallage, of which it would be highly disrespectful to suppose this court capable. But to suppose that this court reversed the judgment of the District court of Winchester, as erroneous, on the ground of the compromise, which did not take place until several years after that judgment was pronounced

old, would present the very solecism which I have just mentioned. If the court, sir, did decide this cause on the ground of the compromise, they relied upon a fact which constituted no part of the record before them; they added a new and important fact to the cause, which changed it fundamentally in doing so; they exercised *original jurisdiction*, by passing sentence, *for the first time, in a new case*, and were not acting *appellately*, in regard to the judgment pronounced by the District court of Winchester. If they reversed the judgment of the District court as erroneous, it must have been because they thought that judgment erroneous at the time when it was pronounced: for if right at the time, it is impossible that it could have been rendered wrong at the time, merely by the force of a fact which occurred afterwards; and all that this court, acting as an appellate court, can say, is, whether the judgment was right or wrong, at the time when it was pronounced. We are bound, then, to believe that this court, moving in the orbit marked out for it by the laws of the commonwealth, and feeling that aversion to encroachment and usurpation which their very doubts in this case evince, confined themselves, in this cause, to the exercise of appellate power merely, by deciding the appeal upon the record, and did not assume to themselves original jurisdiction, by making a new case of it under the compromise.

It should here be remarked, that neither the judgment of the District court of Winchester, nor the judgment of reversal entered of record here, assign the reasons of those respective judgments. That of the District court is a general decision that the law, *upon the case agreed*, was for the defendant: that of this court is merely, that the judgment of the District court is erroneous; which is saying, in effect, that the law *upon the case agreed* was not for the defendant, but for the plaintiff: both judgments, therefore, take the case agreed as their common basis. How, then, can it be said that the judgment of this court did not rest on the basis which it assumes on the record. "The record," we are told by the books, "cannot lie." It cannot be contradicted; it cannot be falsified; much less

shall any thing be presumed against it. How, then, are we authorized to make so bold a presumption as that proposed by Mr. Williams? a presumption which not only contradicts the record, but indecorously involves in it a usurpation of original power on the part of this court? But, above all, how could the Supreme court of the United States, who were called upon to take appellate jurisdiction in this case, and who were bound by the express injunctions of the act of congress to look to *the record only*, as the touchstone of their jurisdiction, have been warranted in declaring the jurisdiction, on a presumption not only contradicted by the record, but incompatible with the respect which was due to this court?

Should it, however, be asserted that this court did and could rightfully take notice of this compromise, not as matter of fact, but as matter of law, I ask with what propriety the compromise of a litigated claim can be considered as an act of legislation. No man would think of calling a contract of compromise between two individuals by such a name, nor of considering it in any other light than as a mere matter of fact; and is its character changed, because a state, by its legislature, is one of the contracting parties? Does that which is *in its nature* a contract cease to be a contract, on account of those who may be parties to it? Or is every act done by a state legislature *necessarily* an act of legislation? If so, all those resolutions of approbation and censure which our assembly is in the habit of passing on the measures of the general government are acts of legislation—every vote of thanks which they pass is a legislative act, and every sword which they present, as the reward of valour, becomes a law of the land!—a rule of civil conduct, prescribed by the supreme power of the state!

If you inspect the particular act in question, you find that it possesses every quality of a contract, without one feature of legislation. It begins by setting out the adversary claims of the commonwealth and of Denny Fairfax to the lands in the Northern Neck—the controversies pending, in different courts, on those titles—a proposition of compromise, made by a previous resolution of assembly to the devisees of lord Fairfax—

the acceptance of that proposition by the agent of those devisees, whose letter of acceptance is set out *in totidem verbis*—and concludes with providing that, *upon the execution of a deed by Denny Fairfax, or those having title under him, or the said Thomas lord Fairfax, extinguishing, on behalf of this commonwealth, his or their title to all lands lying within the Northern Neck, which, by the terms of the above recited proposal and agreement, he or they are bound to relinquish all claim, right, and title of the commonwealth of Virginia in or to any lands lying in the said Northern Neck, which is, by the terms of the said proposal and agreement, to be relinquished, shall, from thenceforth, be extinguished, null, and void.*” Does this act extinguish *immediately* the claim of the commonwealth? No: that extinguishment still depends on something to be *afterwards* done by the representatives of lord Fairfax, and which is made a condition precedent to the extinguishment of the commonwealth’s title. It is, then, not merely a compact, but an executory compact, too, dependant on an act, *in pais*, to be afterwards done by Fairfax, and until this act, *in pais*, should be done, it remained wholly inefficacious, operating neither on the one party nor the other.

But let us concede that this act of compromise shall be called not a mere matter of fact, but a private act of assembly, which is certainly the highest character to which it can pretend: would this have authorized the court of appeals to notice it on the appeal of Hunter against Fairfax? Yes, it may be said, because by the general law of the state private acts of assembly may be given in evidence without being pleaded.—But let us look a little more closely at this provision of our law. By the common law of England a private act of parliament must be pleaded, like any other matter of fact, or it cannot be used upon the trial; the effect of our law then is to alter this principle of the common law, and to permit a private act of assembly to be used at the trial, without having been previously pleaded—it may, says our law, *be given in evidence*. When is evidence given? At the trial. Of what is evidence given? Of matters of fact. To whom is evidence given? To

juries, the constitutional triers of fact. In reply then, to the position that this being a private act of assembly might have been given in evidence, the answer is, that it was not given in evidence: and it is too late to talk of giving evidence, when a cause is standing for judgment before a court of appeals, *upon the record*.

But let us admit that this process of reasoning, simple and conclusive as it appears to be, has no force in it, and that the court of appeals was nevertheless authorized to consider this act as a letter deposited with them for the purpose of settling all controversies arising under it. I ask of what avail this letter, considered in itself, could possibly have been, in settling or, in the remotest degree, affecting any controversy whatever. On the very face of this letter, its operation is *expressly* predicated on an act to be *afterwards* done on the part of Fairfax; for its provision is that *upon the execution of a deed by Fairfax*, the title of the commonwealth should be extinguished. This letter, then, was to derive the inception of its power, from the deed to be afterwards executed by Fairfax; and since that deed was the express and essential pre-requisite to quicken it into life and motion, until that deed came, the letter was a dead letter; a *caput mortuum* merely. Admit, then, that the court of appeals could have looked at it: it would have decided nothing, unless they exercised a power which has been proven not to belong to them; of supplying or presuming the all-important fact that the deed contemplated by the act, had been executed by Fairfax; without which, I repeat it, the act itself, was mere *brutum fulmen*.

Hence, sir, I reach the conclusions that this compromise formed no part of the record; that it could not have been properly noticed by the court of appeals in revising the judgment of the district court of Winchester, that if noticed, it was calculated to produce no effect, without supplying a fact which the appellate court had no power to supply; and that therefore, the compromise is out of this controversy.

I admit, nevertheless, that according to Mr. Munford's report of this cause the decision of this court did proceed on the

compromise only; and I admit, also, that if Mr. Munford's report be *the record of the cause*, it may be doubtful whether the Supreme court of the United States had jurisdiction of this case, on a ground which has not been yet noticed. The act of congress gives jurisdiction only where the decision of the court is *against* the right set up under the treaty. Now it appears by Mr. Munford's report that the two judges who constituted the court of appeals in this cause, were divided in opinion as to the protection given by the treaty to Fairfax's title: but a divided court of appeals, according to our laws, affirms the judgment of the court below; so that, so far as this court acted within its legitimate sphere, as a court of appeals, by restricting itself to the case on the record, the decision of this court was not against, but in favour of the right set up under the treaty; but though we rose by the record, we fell by the compromise, the judgment of this court being in fact, against us; and, hence, if it had been competent to the Supreme court of the United States, to have considered Mr. Munford's report as part of the record, they might have been somewhat perplexed, between the decision in our favour, *de jure*, and the decision against us, *de facto*, to ascertain their jurisdiction; from this perplexity, however, they were relieved by the act of congress, which requiring them to look to the record and the record only, they saw there nothing but the right set up under the treaty, and the naked decision of this court against that right.

I had apprehended that Mr. Williams would have laid hold of this point, untenable and evanescent as it is; and have insisted that according to the report of the case it appears that the decision of this court was not against but in favour of the application of the treaty to the right set up under it. Had he done so, however, the answer would have been obvious. "Sir, you change the terms of the question propounded to us by the court, and dictated to the court itself, by the act of congress; we are not asked whether it appears by *the statements of the reporter* that the decision of this court was against *the application of the treaty* to the right set up under it. But we are

asked whether it appears *by the record*, that the decision of this court was *against the right* set up under the treaty. Again, sir, even if you look from the record to the reporter, although you find that the divided court decided in favour of *the application of the treaty* to the right set up under it, yet you find, also, that the court decided, finally *against the right itself*, which was set up under the treaty. It does not vary the case that their decision was on the ground of the compromise: it is not the less a decision against the right set up under the treaty; and such a decision as, Mr. Leigh has justly argued, equally founds the appellate jurisdiction of the Supreme court whatever the ground of the decision may have been. But the natural candor and dignity of Mr. Williams' mind disdained an evasion of the question so poor and superficial, and I mention it now, rather to do just honour to him, than to dispel, by anticipation, any transient doubt, which might probably flit across the mind of the court, from this view of the subject.

But whatever may have been the ground on which the court of appeals who decided this cause placed their judgment, *according to the evidence of the reporter*, this court, which I have now the honour of addressing, must, like the Supreme court of the United States, decide the present question *by the record only*: and I hope it is by this time very clear that, *tested by the record; comprehending the judgment of the court of appeals*, this was a case in which the application and construction of a treaty were drawn in question; in which the decision of this court was against the right set up under that treaty, and in which, therefore, the jurisdiction assumed by the Supreme court of the United States was in strict consonance with the 25th section of the judicial act of congress.

I come now to the second question propounded by the court which is, 'whether the power now exercised by the Superior court of the United States is justified by the constitution.' As the power now exercised by the Supreme court is in strict conformity with the 25th section of the judicial act of congress, I understand the question intended to be submitted to be whether that section itself be justified by the constitution; and it is.

in this light that Mr. Williams, whom I am answering, has considered and discussed it.

This, sir, is a question of such extreme delicacy, of such awful moment, and, withal, lies so wide of the ordinary track of forensic investigation in Virginia, that I feel much difficulty and reluctance in approaching it. It has not been, I think, until within the last year or two, that the constitutionality of an act of congress has been made a question, in any court of any grade, within this commonwealth. I mention it to the honour of the state; for I think it a proof that our courts have none of that baleful spirit of jealousy which would excite them to be prompt and forward in endangering the peace of the union, by raising needless contests for power with the general government. Other states, perhaps, envious of the pacific disposition, the good order, and general prosperity of our commonwealth, might be ready enough to impute to wounded pride, the refusal to register the mandate reversing your decree; but those who have the happiness to know the real temper of this court are perfectly satisfied that your honours would be much better pleased to find the law in question constitutional, than to be put to the painful necessity, from a high sense of duty, of interrupting the current of jurisprudence marked out by that law. It is under this impression of the sentiments of the court with regard to this question that I shall proceed to examine it, with the most unreserved freedom.

Whether the act of congress, which requires you to register the mandate, be justified by the constitution, is a question which cannot be decided without a clear understanding of the constitution, both as to the relations which it establishes between the state and federal governments, and the character of the particular appellate power now in question.

How is the constitution to be construed? What kind of instrument is it? It is a compact between the states, for the good of the whole, for which they have all paid the highest consideration; a portion of their national sovereignty: hence there results a reciprocal claim on each other, for the faithful observance of its provisions; considered as a compact, it is as a gene-

ral rule, to be construed according to the intention of the parties, to be collected from the whole instrument; and each particular provision is to be construed so as to effectuate the purpose which they had in view. If this principle of construction be too constrained and technical for gentlemen, look at the origin of the instrument, and the pre-existent state of things which led to its adoption. We had articles of confederation—a rope of sand—a federal head without any power of coercion—a government carried on by the courtesy of the several states merely—an unshaped vessel, which nothing could have held together, during the war, but the common danger which pressed around us, equally, on all sides. On the return of peace and the establishment of our independence as a nation, those patriots who had had an opportunity of knowing at once the importance of union among the states, and the weakness of those ties by which that union was secured under the old system, projected the convention which led to our present government. It is an historical and undeniable fact that the present government grew out of the weakness of the old confederation, and was proposed as a remedy for that weakness. The design was to substitute coercion for requisition: and this it was impossible to effect without impairing to a certain extent the sovereignty of the several states; for a sovereign cannot be rightfully coerced; and by creating and submitting to this power of coercion, in the federal government, the states consent to yield their sovereignty *over the subjects ceded*, and in those respects to bow down to the sovereignty of the federal government. Hence it is merely idle and declamatory to talk in this case, about the prostration of the state sovereignties; since the states themselves, who were perfectly competent to it, have agreed to this prostration, in certain respects; and the only question is whether this be one of the respects in which they have so agreed to lower the flag of the state. It results, too, from this view of the subject that the federal constitution, being intended as a remedy for the defects of the old confederation and composed of powers made up of concessions from the state sovereignties, for certain purposes of general good, ought to be ex-

pounded remedially and benignly, in reference to the purposes for which it was expressly ordained. These purposes as announced in the preamble, are, "to form a more perfect union, to establish justice, to insure domestic tranquillity, to provide for the common defence—to promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." Every grant of power in the constitution has reference to the one or the other of these general objects; and hence in construing the grant, it is proper to look to the object for which it was made, and give it such a construction as will attain the object which the parties to the instrument had in view. Let me not be misunderstood, sir. My duty to my client does not require me to become the advocate of what has been called constructive power. But by constructive power what has been always understood? Nothing more than that a power shall not be drawn, by inference merely, either from the general expressions of the preamble or any other part of the constitution, that the power must be expressly granted: But it has never been contended that *the details* by which a granted power shall be carried into effect, must also be found in the constitution. The power once given, the *modus operandi*, it has always been conceded, is left wholly to congress. The constitution says, for example, that congress shall have power to lay and collect taxes, &c.; here the constitution stops on this subject—it does not proceed to limit congress either in the selection of the subjects of taxation, or in the rate of assessment, or in the mode of collection. The most rigorous interpreter of the constitution has never required more than that the general grant of the power in question shall be found upon the face of the constitution: nor has he ever denied that in examining the character of a granted power it was proper to look to the pre-existing evil which that grant was intended to remedy; nor to have reference to the purpose for which the grant was made, and to give it a construction commensurate with that purpose. These principles are so simple and so obviously just, that I should consider myself as insulting the understanding of the court, by attempting to render them more simple and obvious by argu-

ment. I consider myself, then, as standing completely within the pale of those who have uniformly repelled all constructive powers under the constitution, when I assume as the premises from which I mean to deduce my argument, the following principles:

1. That the power claimed by any branch of the federal government, must be expressly given by the constitution and not drawn by implication from it.

2. That in considering a power thus expressly given, we are to take into view the character of that power, the evil which it was intended to remedy, and the purpose for which it was given.

3. That such an exercise of that power shall be allowed, as will remove the evil and accomplish the purpose.

4. That we are not to look for the details of that power and the mode of exercising it, in the constitution; all which are left to congress, under the general grant of power *to carry into effect any power given to either branch of the general government.*

I beg leave to submit an illustration of these principles: "congress shall have power to provide for calling forth the militia, to execute the laws of the union, suppress insurrections, and repel invasions."

What was the pre-existing mischief which this grant of power was intended to remedy? It was, obviously, the inefficacy of those requisitions which alone could be made under the old confederation.

But the constitution, while it expressly grants to congress this power, to provide for calling forth the militia, does not affect to settle the details by which this power shall be exercised. The mode of providing for calling them forth, is left wholly to congress, without any restriction or limitation whatever.

The mode which they have adopted, is to authorize the president to call upon the executives of the several states, for their respective *quotas* of militia.

Now, would it be competent to the governor of any state to resist the call of the president on the ground that it was not

expressly written in the constitution that the president shall have the power of issuing his mandate to the state executives, requiring them to call forth their quotas of militia---that this was an invasion of the sovereignties of the states---and hence that the act of congress affecting to give him that power was a violation of the constitution? If such an objection should be made, would not this answer be completely satisfactory---that this is one of the instances in which the states have ceded their sovereignty to the general government---that they had given up the sword for the general good---that they had given to congress the power (not themselves, to call forth the militia, but) to provide for calling them forth---that as to the mode of the provision, the states, who were the parties to the compact, had left it to congress, without explanation or qualification, and thereby had promised submission to the means which congress in their wisdom, should devise---that to talk of placing a restriction now, by the contumacy of any one state, on this power, left open and unlimited by the constitution, would be, to claim for a single state, the right of amending the constitution at pleasure, and, therefore, would be a direct infraction of the amendatory provision of the constitution itself? Could any candid and reasonable man resist the force of such an answer? Would Virginia resist it? Has she resisted it? Has a governor of Virginia ever refused to yield obedience to the mandate of the president, under the notion that by doing so, he prostrated the sovereignty of the state? And yet the executive of the state is a co-ordinate body with the judiciary of the state---a body no less dignified---and, upon this notion of a separate state sovereignty, wielding a portion of that sovereignty, certainly not of less importance than that which belongs to the state judiciary. Like the judiciary, too, the governor holds his commission from the state; he is responsible to the state alone, and moves in a sphere as distinct from that of the president, as the state judiciary does from that of the federal government. The connexion between the state and federal executives, and the dependence of the former upon the latter, in the instance under consideration, does not pro-

ceed from any direct proposition in the constitution, that this connexion and dependence shall exist: but it results inevitably from that express and unqualified grant of power which the states have made to congress, of providing the means of calling forth the militia; and that promise, which every grant of power implies, of submitting to the means which shall be devised.

Now, sir, let us proceed from this illustration to the case at bar. According to the third article and second section of the constitution, "the judicial power of the United States *shall* extend to all cases, in law and equity, arising under this constitution, the laws of the United States, *and treaties made, or which shall be made, under their authority.*"

Is this a *constructive* grant of power to the judiciary of the United States? Is it not, on the contrary, *express* and *imperative*, in the strongest terms? Is there a power given to any other branch of the federal government, in terms more direct, more clear and strong? Observe—it is not said that the judicial power of the United States *may* extend, but that it *shall* extend, to all cases arising under treaties. What shall be the mode in which it shall be extended, is not, indeed, defined in the constitution, any more than it is defined what shall be the means which congress shall provide for calling forth the militia. Such a definition would go beyond the object of a constitution, which is to fix fundamental principles, and not to adjust details. But the mode of extending this judicial power of the United States is given to congress; for to congress is given the power "to make all laws which shall be necessary and proper for carrying into execution all powers vested by the constitution in any department of the government of the United States." Now, sir, let it be observed—here is an express power given to the judicial department of the United States, over all cases arising under treaties—and express power given to congress to make all laws necessary and proper to carry this judicial power into execution. There is nothing *constructive* here, sir: it is all *express* and *positive*. Let it be further observed, that on this grant of power to congress to extend the judicial

power of the United States to all cases arising under treaties, there is no restriction whatever, except that the laws which they pass for this purpose shall be necessary and proper to the end; that is, *necessary* to extend the judicial power to *all* such cases, and suited to the purpose of so extending it; for the word *proper*, in this place, can, in the said construction mean nothing else than *appropriate—adapted to the purpose*. Any other interpretation of the word would render the clause vague and indeterminate, and would be a cavil utterly unworthy of the dignity and solemnity of this inquiry.

Seeing, then, sir, that it is, in express terms, declared that the judicial power of the United States shall extend to all cases arising under treaties, we have only to ask whether this be a case arising under a treaty? But I have endeavoured to show already that it is such a case; and if I have succeeded in that attempt, the question of this court is answered; for the power now exercised by the court of the United States is justified by the constitution: they have simply exercised jurisdiction over a cause, to which the constitution has expressly declared that their power shall extend.

In order to understand the character of this power still more clearly, let us ask what is its purpose—why was it granted to the federal judiciary? It was, sir, because it was a natural and necessary concomitant of another grant of power to another department of that government. I mean the power of making treaties. If it was proper that the power of making treaties should belong to the general government, to whom should belong the power of construing them? If the national government is to possess the power of pledging the faith, the honour, the interests of the whole nation by a treaty, to what court will you confide the guardianship of that pledge, but to the court of the nation? The grant of this treaty—construing power to the national court, was one in which the whole nation was interested, and on which the whole had an equal right to insist; for upon the sound construction and faithful observance of public treaties the rights and the peace of the whole nation was staked: each, therefore, had a right to a voice in the constitu-

tion of the tribunal to which the interpretation of our treaties should be confided. This, sir, is no new and visionary idea: it is as old, at least, as Aristotle, and is marked with all the depth and accuracy of his mode of thinking. This is the principle which he gives us:—"That all political and *public causes* should be determined by judges *chosen from the people at large*, is agreeable to the nature of democracy." [See Aristotle's *Politics*, book 6. chap. 16.] I ask you this question, sir, and I put it to the serious consideration of the court:—would the states have been satisfied with transferring this important branch of judicial power (the construction of foreign treaties) to any one state, or to the states respectively? Would Virginia, for example, have been willing to confide her faith, her honour, her peace, her vital interests, to the guardianship of a court of Massachusetts? Would she surrender to another state the sovereign power of construing her own treaties, and of enforcing them, according to such construction? Would she yield to the courts of any state the rights of war and peace, as related to herself—for such are the consequences growing out of a false and injurious construction of foreign treaties? If Virginia would not repose this confidence in a court of Massachusetts, shall she expect that Massachusetts will repose it in her? But here is the constitution, the social compact, by which Virginia has agreed that the construction of treaties shall belong to the courts of the nation: by adopting the constitution, she has expressly agreed that the judicial power of the United States shall extend to all cases involving the construction of a treaty of the United States. Will it not be a violation of this compact to say that the judicial power of the United States shall not extend to such a case? Will it not be saying this, to deny the extension of this power to the case at bar—and insisting that the adjudication of this court on a treaty case shall be final? Will the other states rest satisfied with this course? Will they not complain of this infraction of the federal compact? Will they not say—and will they not have some colour for saying,—at least in this instance,—we confided this power to the

courts of the United States—and behold it usurped by the all-grasping ambition of Virginia?

But it is said that, however clear and express the provision of the constitution may be, that the judicial power of the United States shall extend to this class of cases, yet the mode of extending it, by appeal, which congress has adopted, is clearly unconstitutional. How so? Where is the provision of the constitution with which this law clashes? It is merely provided, that the laws which they shall pass, to carry a given power into effect, shall be necessary and proper to that purpose. Let us inquire, then, in the first place, whether the law they have passed be not *necessary* to the purpose?

It is alleged that the state courts have at least concurrent original power over treaty cases; there being nothing in the constitution which denies such a power to them, in the first instance; but, on the contrary, the sixth article of the constitution, contemplating such a power, the proposition is granted. A suit, then, involving the construction of a treaty, is commenced, and properly commenced in a state court: here is a constitutional case—a case to which it is expressly said the judicial power of the United States *shall* extend. Now, in what form, less exceptionable, can congress extend this power, than by permitting the case to pass to the highest court of the United States, and giving the party who claims under the treaty a right of appeal, if the decision shall be against his right? To extend the judicial power of the United States to a case regularly commenced in a state court, it is not only necessary, but indispensably necessary, that the cause should be taken from the state court to the federal, either during its progress, or at its termination in the courts of the state. No other possible mode exists. Congress has adopted both modes, in regard to the several constitutional cases. Now, will it be said, that the first mode, that of removing a cause in its progress, is more constitutional than the last? That congress might correctly remove the cause, during its progress; but not at its close? I ask what possible objection can apply to the last mode, which is not equally applicable to the first. As to the notion, that the

appeal, with its consequences, is an invasion of the sovereignty of the state courts, I ask whether wresting a cause from their jurisdiction, in its progress, against the will of the plaintiff, and against their own will, be not also an invasion of this imaginary sovereignty? A citizen of Virginia applies to a court of his state for redress against an alien: the alien appears, and demands the removal of the cause to the bar of the federal court: the citizen insists, and rightly insists, that the jurisdiction of the court has attached to the cause: he claims the continuance and protection of that jurisdiction. What shall the court do? Must it, *per force*, resign the cause to another, and a distinct tribunal; a cause, too, upon which its jurisdiction had rightly attached? If it *must* do so, what becomes of its sovereignty? What! one sovereign court *compelled* to surrender a cause of which it rightfully had possession, to another court, not more sovereign than itself! And yet, according to the argument I am answering, it must do so! It must not merely connive, and passively permit the defendant himself to remove the cause—though this would be a sufficient surrender of its sovereignty—but it must take notice of his demands—it must take an active part in the surrender of its own sovereignty—it must make an order for the removal of the cause; which order is entered upon its records; and this very court, in fact, did so, in the case of *Brown v. Crippen and Wise*, from the eastern shore. What was this judgment but, in effect, an admission that, in cases confided by the constitution to the peculiar cognizance of the courts of the nation, for great public purposes, the sovereignty of the state courts was out of the question, a mere topic of idle and illusory declamation?

It is objected that we misconstrue this provision of the constitution which directs that the judicial power of the United States shall extend to all cases arising under treaties; for it is said that this second section of the third article is not to be considered by itself, but to be read in connexion with the first section of that article; that the first section declares that the judicial power shall be vested in one Supreme, and in such inferior courts as congress may, from time to time, or-

claim and appoint; and that the second section does no more than to point out the subjects on which that judicial power, so vested shall be exercised; that the judicial power residing in the courts of the United States shall extend to all cases arising under treaties, &c. And what, I ask, has congress done more than to extend this judicial power to the cases enumerated? When they direct that a constitutional cause may be removed, in its progress, from a state court into a court of the United States, or that it be removed, revised and corrected, after its decision in the state courts, by the Supreme court of the United States, what do they do more than to extend the judicial power of the United States to those cases to which the constitution of the United States imperatively says that it shall extend. If the objection mean that the courts of the United States are by the constitution erected into a distinct and separate system, and therefore cannot touch the state courts, at any point, nor interfere with a cause which has been drawn within their jurisdiction, I answer, in the first place, that the objection is fatal to the jurisdiction claimed for the state courts, on this class of subjects; for if the judicial power of the United States shall extend, in some shape or other, either originally or appellately, to every case belonging to the class; and if the courts of the United States cannot touch a case, once brought within the jurisdiction of a state court; it follows, of necessity, that the state courts cannot touch one of these cases, without defeating, in every such instance, this provision of the constitution; for, according to the argument, every case brought into the state courts, is taken *for ever* from those courts, whose jurisdiction, the constitution expressly says, *shall* extend to it. And if this be true, there is no way by which the purpose of the constitution can be satisfied, but by denying to the state courts all jurisdiction over the whole class of constitutional cases. I answer, in the next place, that it is not true that the courts of the United States cannot touch a case, once brought before a court of the state; as has been conceded by this court, in the case before cited of *Crippen and Wise*.

It is insisted, however, that the giving jurisdiction to the federal courts over these cases, does, by no means, exclude the concurrent jurisdiction of the state courts. But it is very clear that both the terms and the reason of the grant, certainly exclude the *final* jurisdiction of the state courts. For how can the judicial power of the United States extend to *all* cases arising under treaties, if the state courts decide *finally* all cases brought before them? It will depend upon the choice of the plaintiffs, whose partiality for the courts of their own state will always lead them to give *them* the preference, whether this provision of the constitution shall not be wholly abortive. For if plaintiffs choose to institute all such suits in the courts of their respective states, then the jurisdiction of the United States, instead of extending to *all* such cases, will extend to *none* of them. Will this satisfy the terms of the grant? Much less will it satisfy the purpose; for what was the obvious purpose? Was it not to place the just construction and faithful observance of treaties, for which all the states were equally responsible, under the care of those courts which *all* the states had a voice in composing. And what, I ask, becomes of this purpose, this great national object, under the final jurisdiction claimed for the several states over those subjects? What uniformity of decision can be expected from such a course? You have eighteen different state tribunals, placing eighteen different constructions on the same article of the same treaty; not only differing among themselves, but differing from the construction of the national tribunal, in regard to the same article! For if the power of the state courts be sovereign over these subjects, a decision of the Supreme court of the United States will have no binding authority on them! They will not be found to conform to it. And they will not conform to it. Under this disorganized, disjointed, jarring and clashing chaos of jurisprudence, what becomes of the consistency, the dignity, the honour, the good faith of our country! What becomes of the peace of the United States! In one state, the rights of a foreign subject, claiming under a treaty between his government and ours, may be respected; in a second it may be au-

ulated; in a third trodden in the dust! What security will a foreign nation have in treating with such a country? What foreign nation will treat with us? What foreign nation that has treated with us, will tolerate such an inconsistent and abusive construction of her treaties?

But let us examine, a little more attentively, the objection made to the propriety of this law, that the courts of the United States form a distinct and separate system from the courts of the states; and hence that the idea of appealing from the one to the other is a juridical solecism; that an appeal from one court to another implies that the court appealed from, and the court appealed to, form parts of the same system; which is not true of the courts in question; since the state and federal courts have no common head; deriving their commissions from different powers, and owing their respective responsibilities to different authorities.

The first remark which I shall make on this objection is, that the *postulatum* on which it is built is borrowed from a government wholly dissimilar to ours; and therefore, however true, in relation to that government, becomes, when applied to us, fallacious. Our notions of jurisprudence are borrowed from the British government. That government is, comparatively, simple and homogeneous. The king is the fountain of all office and honour: the courts of that country all derive their commissions from, and owe their responsibility to him. Hence the regular gradation of those courts, and the unity and coherence of the system. Accustomed to the contemplation of that system, and to seeing the appeal rise there in regular succession, from the lowest to the highest court, we are shocked, and are apt to imagine that there is something inherently absurd and preposterous in any course of appeal, which shall break the beautiful regularity of an ascending appeal, through the same system. But, sir, it would be puerile and visionary, to transfer these speculations to our government, and attempt to apply them in practice here. Our federal government, so far from possessing the simplicity and unity of the British system, bears no resemblance to it whatever, but, as it has been

the courts of the nation. In regard to these questions, therefore, a subordination of the state to the federal courts, is clearly produced—and subordination *ex vi termini* implies connexion. It is a connexion, indeed, *partial, confined to the cases enumerated in the constitution; but, as to these, a clear connexion and subordination, declared by the voice of the sovereign people.* Where, then, is the absurdity of an appeal? To ground an appeal from court to court, it is not necessary that these courts shall, *in all respects*,—as to their commissions and responsibilities, for example,—be parts of the same system. To ground an appeal, it is enough that the court appealed from should hold a subordinate jurisdiction over the subject, in relation to the court appealed to. Even in Great Britain, it is not the identity of commission and responsibility which gives the appeal; it is the grades, the subordination of the courts, in relation to each other, and in relation to the subject of the appeal. So that the same basis of appeal over the subjects specified in the constitution, exists here which exists in England.

Sir, it is very strange that this absurdity which makes so splendid a figure in our declamations, should never have occurred either to the statesmen who had a principal hand in forming the constitution—nor to the sages of Virginia who adopted it—nor to the patriots who composed the first congress and by whom the law in question was enacted. So far were *they* from deprecating the concurrence of jurisdiction between the state and federal governments, with a final right of appeal to the latter, that they all united in expressing, in the warmest and strongest terms, their hopes that such a system would be adopted in carrying this article into effect: so far from apprehending that the pride of the states would take fire at such a course, it was one of the favourite arguments by which they sought to allure the people to a ratification of the instrument. Mr. Leigh has already cited several passages of the Federalist to this effect: but Mr. Williams puts aside the authority of the Federalist with a high and indignant hand—“it is a party work,” he says, “written merely to persuade the people to adopt the constitution.” It is not for me to pronounce the

a part of the system of the federal executive? I do not say that his commission is changed—that he is made a federal officer; but that his duty to his own state, which forms a part of the federal union, and his oath of office to support the constitution of the United States, requires him to yield obedience to that government to which the sovereignty over this subject has been yielded by the constitution. I ask if it was not fully competent to the people, the fountain of all power, to produce this partial connexion, dependence, and subordination of the several branches of the state government to the corresponding branches of the general government? And if they might do it at their pleasure, it is in vain to say, that, by doing so, they would depart from the symmetry of the British or any other government. The truth is, that our whole government is a departure from the British, and every other government on earth. We have done as we had a right to do—composed a government for ourselves—struck out a new plan of our own, without copying any existing model—and it is therefore idle and delusive to apply ideal analogies, drawn from any other model, to the construction of our own.

If it be conceded that the sovereign people might, if they chose, have produced a dependence and subordination of the several departments of the state governments to the corresponding departments of the federal government, the only remaining inquiry is, have they done so? I have shown that they have done so, in the case of the executive department. Have they in the case of the judiciary? I think it equally clear that they have; for by declaring that the judicial power of the United States shall extend to all the enumerated cases, they have, in effect, declared that the state judiciaries shall not *finally* take away *any one* of the enumerated cases from the federal courts—the federal courts are, therefore, placed on commanding ground over all these cases; they have a right to insist that *all these cases* shall be ultimately submitted to their adjudication. For it is utterly impossible to execute this article of the constitution, according either to its letter or its spirit, without bringing *all* these questions to the ultimate decision of

to the courts of the nation. I refer you to the 2d volume of Lloyd's Debates of Congress from page 264 to page 376. I do not quote these debates to prove that congress had the right to do what they did, but to prove the strong and general conviction and feeling of the day as to the expediency and propriety of this appellate power which is now thought so obnoxious. I consider all this as a contemporaneous exposition; and I consider the acquiescence of the people under the operation of this law for five and twenty years, as expressing their approbation of the construction from which it flowed.

One further consideration, sir, and I have done—an appeal has been made to your pride by the counsel who preceded me. You have been asked whether it comports with the dignity of this court, the highest of a sovereign state, to be obliged to register the mandate of another tribunal, and, that considered in regard to us, a foreign tribunal; and to carry that mandate into effect against your own conviction of the right of the case. Why, sir, if the constitution, which you are sworn to support, connects you with that tribunal in this instance, and gives them a controlling power over you, so far as regards the particular case, where is the degradation of submitting to a superiority thus established? The several governors of Virginia have not felt themselves degraded in executing the mandates of the president of the United States, nor do I believe their fellow citizens have considered them as degraded by the cheerfulness, promptitude and vigour with which they have carried those mandates into effect. Had they from a false pride, refused, had they hesitated, I believe that they would have been hurled from their seats at the next election. In executing the mandate of the Supreme court in this instance, you do no more, sir, than to yield to the constitution of the United States. That constitution by an express grant, extends the judicial power of the United States to all cases arising under treaties. It gives to congress, by an express grant, the power of making all laws necessary and proper to carry this judicial grant into effect. Upon the admission, warranted by the second clause of the sixth article of the constitution, that

the state courts have original jurisdiction of treaty causes, it was not possible for congress to extend the judicial power of the United States to cases commenced in the state courts but either during their progress in those courts, or at their termination—either mode in reference to the sovereignty of the state courts, was equally exceptionable or equally proper, while the one or the other was indispensably necessary. Congress, consulting the convenience of the people, has adopted both those modes of reference in the several cases to which they were required to extend the judicial power of the United States by the constitution. The law by which they have sought to execute this judicial grant was, therefore, necessary to the purpose of the constitution and suited to the accomplishment of that purpose—and being necessary, was proper in every sense of the word. Congress, then, have done nothing more in this instance than to pass a law necessary and proper to carry into execution a power expressly granted by the constitution, and hence I have no difficulty in answering the question of the court, “that the twenty-fifth section of the judicial act is warranted by the constitution of the United States.”

Nicholas, attorney general of Virginia, as *amicus curiæ*, delivered his sentiments on this subject to the following effect:

The question I mean to consider, is, whether a writ of error may, constitutionally, lie from the Supreme court of the United States, to this court? in other words, is the judicial act of congress, in this respect, constitutional?

Before I proceed to the main question, I will notice some preliminary points.

It has been said, that the objection now made to this appellate jurisdiction of the Supreme court of the United States, is unseasonable, the act of congress having been in operation ever since the year 1789, without doubt or dispute concerning its validity. But this consideration can weigh very little: no length of time can sanction the act, if it be unconstitutional. The question has never before been raised, and therefore never considered, much less adjudicated, in the courts of this commonwealth who are now to decide for themselves.

It was also insisted, that the controlling power now proposed to be exercised by the Supreme court, has been sanctioned by the decisions of that court. I answer, that the *exercise* of unconstitutional powers does not confer the *right* to exercise them. Besides, in neither of the cases, that have been cited, was the point made or discussed; and, therefore, cannot be considered as decided; as this court very justly held, when it decided that it had no criminal jurisdiction, although such jurisdiction had been often before unwarily entertained.

Contemporaneous expositions of the constitution have also been called in aid; the first of which is that contained in the judicial act itself. But I can never admit the authority of this kind of exposition of the constitution; it might go the length of nullifying the constitution altogether. There are some similar contemporaneous expositions of that instrument, which we have the authority of the Supreme court of the United States itself, to disregard; and others, which the judgment of this whole people has condemned and exploded.

As to the book called *The Federalist*, it is utterly unsafe to resort to it for contemporaneous expositions of the constitution; because, whatever be its merits, it is the work of professed partisans of that system, before its adoption, to render it palatable to the people. It is an eulogium on the system, a vindication of it against popular objections; it is not, nor was it intended to be, an impartial exposition of its meaning and effect.

In discussing the constitutionality of the judicial act of congress, in respect to the appellate jurisdiction, which it authorizes the Supreme court to exercise over the supreme state courts, it is proper,—as has been said,—to consider the genius and character of the constitution.

The states were originally sovereign, on the dissolution of the British government. Virginia, in particular, assumed the attributes of sovereignty, and declared herself independent before the United States did. [*See the Constitution and Bill of Rights of Virginia, bearing date the 29th June 1776; and 1 Tuck. Bl. 89.*] She then, with the other states, entered into

a confederation, and that confederation expressly recognised the independence and sovereignty of each. [*Sect. 2.*] In the subsequent formation of the new government, the state sovereignties were retained, except so far as the rights of sovereignty were granted away. [*1 Tuck. Bl. 175.*]

But it is said to be wonderful that the portion of state authority now in controversy should be contended for; and it is asked, when the states have parted with the more splendid attributes of sovereignty, why contend about *this*, which, comparatively, is unimportant? The parting with some of the attributes of sovereignty makes the remainder more dear and valuable.

It has been said that the constitution ought to be considered as a remedial instrument, and great liberality allowed in its construction. This position is in conflict with the theory of our political system, in which the federal government has no powers, but such as are *expressly* granted, or *necessary* and proper to carry those which are specified into effect. This resulted from the nature of the government, being a delegation of specified powers, and all others being retained by the states. But the twelfth amendment to the constitution removes all doubts on the subject by declaring this in terms.

I proceed now to the constitution itself. By the first section of the third article, the judicial power of the United States is confined to "the Supreme court, and such other courts as the congress may, from time to time, *ordain and establish*," which, evidently, can be no other than the courts of the United States. "The judges, *both of the Supreme and inferior courts*, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office." This clause is inconsistent with the idea, that the state judges, whose tenure of office depends on the regulations contained in the state constitutions, can be considered as judges of the federal courts, or that congress can transfer to the state courts, the exercise of the judicial powers of the United States.

The congress has not this power; 1st. because the judicial is a portion of the sovereign power; and that of the states was retained by them, no control over the state judicatures being given to the United States by the constitution. [*See 1 Tuck, Bl. 178.*]

2, There is no connexion between the federal and state judicaries: *they are not parts of one whole.*

3. The judges respectively hold, or may hold, by different tenures; they hold under different commissions, and take different oaths. The consequence then would be, if the state judges could exercise the judicial power of the United States, that, though the constitution defines the tenure of those by whom it is to be administered, it might be administered by judges not holding during good behaviour, but at the will of the state legislatures.

4. Such a construction might go to destroy the independency of the state courts, or their connexion with, and amenability to the states. Their independence might be destroyed, and their utility also; for congress might heap burthens upon them too oppressive to be borne without increase of compensation. And if congress can compensate them for such additional duties, then, though the constitution of the state declares that their salaries shall be *fixed*, they would be made to fluctuate according to the will of congress. Besides, it is the policy of the states to prevent state-officers, from being invested with federal offices or emoluments. [*1. Rev. Code p. 40. 392.*]

5. Upon the supposition that federal jurisdiction may be conferred on the state courts, a question presents itself: If a state judge should violate his duty to congress, how is he to be tried? Not by the state laws; for his offence is not against the state. Not by the federal laws; for the power of impeachment is confined by the constitution to federal officers. [*See sect. 4. article 2.*] But, suppose he could be convicted under the constitution, would that incapacitate him as a state judge?

These difficulties show the inconvenience which would result from such contradictory and conflicting duties.

In the case of *Diggs and Keith, v. Wolcott*, [4 Cranch 179] it was decided, that a court of the *United States* cannot enjoin proceedings in a *state* court, and, in *Feeley's* case, (*Hobbes and Breckenborough's* Reports) the general court of this commonwealth, eight judges being present, unanimously decided that congress cannot confer on the state courts federal jurisdiction. It follows from parity of reason, that the federal courts cannot exercise *appellate* jurisdiction over the state courts; because the judicial power being confined to the courts of the *United States*, the appellate power must be confined to deciding appeals from *one of those courts to another*. The very essence of *appellate* power is to examine the decision of an inferior court of the same government, and not of a different, and, in this respect, independent government. Before an appeal would lie, it must be proved that the decision appealed from was an exercise of a portion of the judicial power of the *United States*. But congress cannot enable a state court to exercise any portion of the judicial power of the *federal government*. Therefore such appeal does not lie.

But, on the other side, it is said that the argument of the *Federalist* is unanswerable. I proceed to examine it.

In the second vol. p. 245, No. 82, the writer says an appeal from the state to the federal courts would *certainly* lie. But this being mere *assertion*, it might be sufficient to deny it. In the latitude contended for the passage referred to, the right of appeal to the supreme court, from the state courts, is asserted to exist, in all cases of concurrent jurisdiction. This would give to the pretension of the federal courts, a much more alarming sweep, than the construction now contended for, claims for them, or than the act of congress sets up. The *Federalist* next alleges, that the appellate jurisdiction given to the Supreme court, is "without a single expression to confine its operation to the inferior federal courts; the objects of the appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, and from the reason of the thing, it ought to be construed to extend to the state tribunals." It would appear that in the opinion of the

Federalist, because there were no express words, limiting the appellate power to inferior federal courts, it would of necessity extend to state courts. This reasoning is certainly incorrect. When the framers of the government were organizing a judiciary system, after using terms that confine the federal judicial power to the courts of the United States, they then speak of the appellate power of the Supreme court. Every one must understand them to mean a power to be exercised, within their system of courts; nor would it require words of exclusion to prevent the federal courts extending their jurisdiction to the courts of another sovereignty, which in no part of the constitution are spoken of, as constituting a part of the federal judicial system. So far from requiring negative words to prevent an invasion of the state courts, it would require strong and express terms to induce a belief, that a measure was contemplated, so inconsistent with the general character of the government. Without any express restriction on the federal judiciary, I contend, that the limitation on it, to appellate jurisdiction over the federal courts, results from the nature of the government. By the organization of the federal judiciary, large judicial powers were left with the states. All, not given exclusively, to the general government, were retained. The provisions on the subject, in the constitution, are affirmative merely, and by no means excluding the state courts, from the jurisdictions conferred by their own governments. It would seem difficult to reconcile the declaration "that the objects of appeal, not the tribunals from which it is to be made, are alone contemplated" in the clause about appellate power, with the attempt, from the generality of the terms conferring this very power, to include the state courts within its scope. As to the argument drawn from expediency, used by the **Federalist**, when he states, that either the appellate power over the state courts, must reside in the federal courts, "or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judiciary authority of the union, may be eluded at the pleasure of every plaintiff, or prosecutor;" it is to be remarked, in the first place, that arguments from

expediency, are not admissible to prove the existence of a constitutional power, unless it be previously shown, that there is some clause in the constitution, which by a fair construction, would include that power, or unless the power claimed be necessary, and proper to enforce a delegated authority. As to the idea of excluding the state courts from concurrent jurisdiction, such a pretension has never been seriously set up, and such jurisdiction is admitted by the Federalist himself. And as to the danger of eluding the judiciary authority of the union, foreigners or citizens of other states, where plaintiffs, can choose their court, and where defendants, can transfer the causes from the state, to the federal courts, under the act of congress,

But it is urged that it is essential to the peace and safety of the United States, that such a power as is contended for, should be vested in the federal court. The right of the state courts to an independency on any other government, as to the decision of causes, heard and determined by them, is not a novel, or arrogant pretension. It is a right exercised by all nations; the rule being universal, that questions must be decided by the local laws and local tribunals, where the party is found, or the real estate is situated. [*Vattel, book 2. ch. 3. § 103.*] As to the danger of war, it is not recollected that wars have proceeded from the supposed incorrectness in the decisions of municipal courts. To make war for such a cause would violate the principle of national laws, which has just been referred to. The United States have suffered as much, or more than any other nation, from the injustice and rapacity of foreign judicatures, but never made it the ground of war.

The Federalist proceeds—"The national and state systems are to be regarded as one whole." This position, as applied to the federal and state courts, is denied to be correct. Let the passage in the constitution be referred to, which makes the state courts a part of the federal judicial system. So far from there being any provision to countenance the idea, the federal system is expressly declared to consist of a Supreme court,

and such other courts as congress shall from time to time ordain and establish. To show that the state courts are a part of the federal system, it is necessary to prove that they are ordained and established by congress. As well might it be said, that the courts of England and France are so ordained and established. The arguments in the passage succeeding the one just quoted, by which the writer attempts to prove that the state courts are auxiliaries, or rather satellites, of the federal tribunals, and that all causes in the enumerated instances of federal jurisdiction, must receive their original or final decision in the courts of the United States, being founded on the theory of a supposed unity of system in federal and state judicatories, must be of no avail, unless that theory can be supported.

But it is said that two concurrent jurisdictions, both final, is a monster in jurisprudence. Such a jurisdiction is exercised every day. Two men shall go to Baltimore or Philadelphia, buy goods, and give their notes: one is sued in the federal, and the other in the state courts; judgment is obtained in each; appeals taken to the Supreme courts of either government, and the decisions of both are conclusive.

The Federalist, in the concluding part of the number under consideration, pushes the construction he contends for to a still greater extreme than that already considered, and insists on the right of congress to give appellate jurisdiction to the inferior tribunals of the United States, over the decisions of the state courts: so that, according to this doctrine, the lowest court which congress could establish might control the decisions of the Supreme courts of the states. This consequence, so derogatory to the rights and sovereignty of the states, so inconsistent with the principles of a just jurisprudence, is supported by the same clause of the constitution (as the Federalist contends) which authorizes an appeal to the Supreme court. I mean the clause, vesting the judicial power in one Supreme court, and such other courts as congress may, from time to time, ordain and establish.

It would appear to me to follow, from the view I have taken of the subject, as congress has no right, under the constitution, to transfer to the state courts any portion of the judicial power of the United States, that this court cannot legally comply with the requisition or mandate of the Supreme court to register its decree, and enforce the execution thereof; which appears to me to be plainly a demand upon this court to exercise a portion of that judicial power, which by the constitution is vested in the Supreme court, and such inferior courts as congress shall ordain and establish. Before there should be a compliance with the requisition of the Supreme court, it ought to be proved that this court is ordained and established by congress.

It is contended by the gentlemen who advocate the jurisdiction of the Supreme court, that if the power of awarding a writ of error to the state courts, from the federal tribunals, be decided to be constitutional, the provision which enables a defendant to remove a cause to the courts of the United States, is equally so. If this consequence would result, it would not prove the power of the Supreme court, in the present instance. All that could be said would be, that both provisions are equally nugatory; and that it is not incumbent on those who contend against the jurisdiction of the court of the United States, in one case, to establish it in another. But it seems to me that the two provisions stand on essentially different ground. In the one case, all that congress say is, that in particular instances, coming within the acknowledged limits of federal jurisdiction, the state courts shall cease to act. They are not called upon to exercise federal jurisdiction, but to abstain from acting, in a case where cognizance is given, by the policy of the constitution, to the United States' tribunals. In the case now under discussion, the power attributed to the Supreme court is, to force a state court from its proper orbit, and to place it within the sphere of a system, of which it constitutes no part, and to which, by the terms of the constitution, it is foreign.

Another objection to the power contended for is, that the act of congress is not just or equal in its operation. If a decision is on one side, an appeal lies; but if on the other, it is conclusive. One object of the constitution was to establish justice. Can it be said to attain this end, when the conclusiveness of a judicial sentence is made to depend, not on its conformity to the principles of law or equity, but to the side of the question which the court happens to approve?

The cases referred to on the other side do not appear to be applicable. Olmstead's case was that of a decision of the federal court, acting within its appropriate sphere, and triumphing over an improper opposition from state authorities. Nor can the respect which has been paid to the decisions of the federal courts, by those of the states, in treaty questions, particularly in those which related to the payment of British debts, be considered as a recognition of the right, in the courts of the United States, to exercise the appellate power claimed for them. It only proves the existence of a comity between those courts, which the public good requires, should always subsist; and that the state courts feel—as I trust they always will—great deference and respect for the decisions of able and enlightened men, particularly in relation to questions which depend on the construction of the laws of the United States, or treaties made under their authority.

The government of the United States, viewed as a national government, instituted for general objects, but operating on states; which retain their individual sovereignties, must be considered peculiar in its organization. No exact parallel is to be found in the ancient confederacies, or those of more modern times. This will afford an answer to any analogies which are supposed to exist between the courts in England, awarding writs of error, to the courts of the dependencies on that country, and a similar power exercised by the Supreme court, to those of the states. Though the ultimate resort from the courts of Ireland is to those of England,—the court of King's Bench awarding writs of error to the King's Bench in Ireland, and an appeal lying from the Irish court of Chancery to the house

of lords—yet it will be seen, by reference to the writers on English jurisprudence, that this appellate power in the English courts is founded on the acknowledged inferiority and dependence of Ireland on the crown of England; which dependence is not marked out by a particular charter, limiting its extent, but is general in its nature, and in a great degree regulated by expediency, in its application. [*See 1 Blac. 104.*] The same observations apply to the other colonies and dependencies on the British crown. But, surely, these examples are inapplicable to our case, where the authority of the head of the confederacy is specially defined; where all power, not given, is retained, and where the state sovereignties are admitted to exist; unless, indeed, it can be shown that the authority claimed is embraced by the charter, transferring to the general government a portion of the powers originally vested in the states and the people. It has already been attempted to be demonstrated, that nothing in the constitution impairs the independency of the state judiciaries, and that congress has no power to employ them as vehicles to administer the laws of the union.

Hay, as amicus curiæ. The questions which I propose to discuss, are these: 1. Is the 25th section of the judicial act, which gives to the Supreme court of the United States an appellate jurisdiction, in certain cases decided in the Supreme court of a state, authorized by the constitution of the United States? 2. If this section be not so authorized, can this court undertake to declare it unconstitutional; or does the right to make this declaration in this case, and in all cases affecting the jurisdiction of the Supreme court of the United States, belong, exclusively to that court?

Before I engage in the discussion of the first question, to which my attention will be principally directed, I will submit a few remarks not yet presented to the court, which possibly may contribute to *make straight the way*, leading to the ground about to be explored.

There is a radical difference between a state government and that of the United States. The first possesses a general, the latter a special power of legislation. A state government

possesses a right to legislate on all subjects, those only excepted, on which it is forbidden to act. The government of the United States, on the other hand, possesses no power to legislate, except on those subjects on which it is expressly empowered to act.

The inference from the proposition just stated, is, that when the validity of a state law is denied, he who makes this denial, must prove that it is forbidden by the constitution of the state, or that of the United States. But when a law of the United States is brought into question, it must be proved to be made in conformity to the federal constitution.

This inference applies directly to the case before the court. A claim of appellate jurisdiction over this court, is made in behalf of the Supreme court of the United States, and the 25th section before mentioned, is exhibited as the foundation of the claim. I require proof that the constitution of the United States gave to congress power to pass this law. The *onus probandi* lies on my opponents; it is not enough for them to create a doubt upon the subject; as long as there is doubt, the claim cannot be allowed; they must *prove* that the law is warranted by the constitution of the United States. But I am content to relinquish this point, and am willing to concede, what in strictness cannot be required, that every law passed by the congress of the United States and approved by the president, ought, not only in the courts of the United States, but in this court and in all courts, to be *presumed* to be warranted by the constitution of the United States. Under this concession, it is incumbent on me to prove that the law in question is not so warranted. This task I undertake to perform, not by subtle and technical disquisition, not by means of that sort of special pleading, which after being almost driven from the law, has lately found refuge in politics; but by a fair, rational, candid, and I may add, a liberal interpretation of the constitution.

The court, I trust, will not deem it improper in me to remark, that in advocating this doctrine, I am not delivering with a view to suit my own argument, an opinion recently formed, the result of reflections since the commencement of this dis-

cussion; but an opinion, adopted and *maintained* several years past, after mature deliberation. I am now travelling through a country, which I have frequently explored.—Some of the judges of this court, perhaps all, will distinctly understand me.

I will submit another preliminary remark. The great and fatal defect of the old confederation, was, that the exercise of its most important powers, depended on the co-operation of the state governments. Instead of raising men for the defence of the nation and money to supply the public wants by its own authority, acting directly and immediately on the people, it was compelled to rely on requisitions addressed to the legislatures of the states.

The object of the new confederation was to remedy this defect, by making the powers of the general government, entirely independent of the state governments, and by applying them, without the concurrence of any intermediate authority, directly to the people. It is believed, that this policy has been uniformly maintained throughout the constitution. Not a single instance is recollected in which the effect of a power, granted to the general government, is left to depend on the consent or co-operation of the states. But the construction of the constitution, now contended for by the appellee's counsel, in giving to the Supreme court of the United States an appellate jurisdiction over the Supreme court of a state, produces an anomaly in our system, which it is difficult to believe could have been intended. If the state court will not suffer its record to be sent up, or refuses to register the edict of reversal, a collision, against which the government is in all other cases effectually secured, is unquestionably produced.

A third preliminary remark, may not be unworthy of attention.

Great stress has been laid on the fact, that the law in question was adopted by many of the men who formed the constitution; and the inference is, that they *must* have understood the meaning and spirit of the constitution, which they had themselves contributed to establish. This reasoning is repelled by many considerations, cogent, if not conclusive.

The judges of this court are bound by oath to maintain the constitution, as the paramount law of this land. In the performance of this high and sacred duty, they must exercise *their own* judgment. They must pronounce *their own* opinions. It would be sacrilege to surrender them.—The opinions and reasoning of other men, especially of those who were called by the people to form a constitution, and then to legislate under it, are certainly entitled to the most respectful and serious consideration; but to no more. The presumption, it is admitted, is, that they are right; but however obvious or strong the presumption may be, it is still a presumption only; and of course may be repelled by evidence and argument of greater force. The propriety of this reasoning is supposed to be completely evinced by the fact, that the 13th section of this very law, so far as it gives original jurisdiction to the Supreme court, has been declared by the Supreme court of the United States to be not warranted by the constitution, and therefore void. 1 Cranch, p. 138.

From the congressional debates of September, 1789, when this law was passed, it does not appear, that the question now agitated in this court, was ever presented to view. This law, therefore, cannot, even if any law could, be regarded as an authoritative exposition of the constitution. It is at most a *dictum* only, and certainly ought not to be regarded as of higher authority than a *dictum*, in which all the judges of this court might concur. What is due to such a *dictum* we all know. In the case of *Bedinger vs. the commonwealth*, this court solemnly decided, that the jurisdiction in certain criminal cases, which they had exercised for years without question, did not belong to them.

In September, 1789, the congress of the United States had great and essential duties to perform. In the course of a single session they had, among other things, to provide for the organization of the government; for its support, by a revenue to be immediately raised; for the establishment of the judicial tribunals; and for the distribution and execution of the judicial powers of the United States, criminal as well as civil. In the

pressure of business thus thrown upon them, it ought not to be a matter of wonder or even of regret, if, in one or two instances, they failed to measure with perfect accuracy, the power which they exercised, by that standard, by which all they did was to be regulated.

The force of the argument under review is diminished, if not destroyed, by that great principle, which in the state constitutions, as well as in the constitution of the United States, keeps the legislative, executive and judiciary departments entirely distinct. Those who made the great law, the constitution, are not, according to this fundamental principle, to be deemed its best expounders.

There is yet another remark on this point, which I will take leave to suggest.—The political party, to which the majority of the first congress belonged, or at least, many of that party, then entertained, and soon afterwards openly avowed the doctrine, that constitutionality and expedience were convertible terms. Congress, it was said, might constitutionally pass any law, which they might think calculated to secure or promote any of those objects, which are stated in the preamble, as the causes for ordaining and establishing the constitution of the United States. This heresy, though not dead, is at present asleep; and certainly it is not improper to say, that those who had thus wandered from the true faith, ought not to be regarded as orthodox expounders of our constitution. On this point I will submit one more remark.—There is no temerity in saying that the constitution is now better understood, than it was in 1789. It would be indeed strange, if such were not the fact. We have had 25 years to examine it in detail, and to observe its practical operation. This idea is very distinctly intimated in the 2d volume of the Federalist, page 243. To that volume the court is referred, and will not therefore be troubled with my observations on the subject.

There is, however, one fact, affording so striking an illustration of the truth of the remark just made, that I will take leave to state it. Mr. Pendleton, whose name ought never to be mentioned without the reverence due to virtue and to talents, and who ~~was~~ uniformly devoted to the service of his country; Mr. Pen-

dleton, who presided so long and so ably in this court, and who was selected by the distinguished citizens who constituted our state convention, to preside over their deliberations, even Mr. P. is represented as saying, and no doubt did say, in speaking of the future judiciary of the United States, that "the first experiment probably would be to vest in the State courts the inferior federal jurisdiction." (*Virginia Debates*, p. 367.)—The judicial power of the United States is, by the express terms of *the constitution*, vested "in a Superior court and in such inferior tribunals as congress might, from time to time, ordain and establish"—and yet, according to this idea it might, *by law*, be vested in courts, not only not so ordained and established, but ordained and established by another government, and responsible to that other government alone. I am not, however, surprised at this opinion, erroneous as I am sure it is. The mind of this venerable man, profoundly occupied with *the great question* then under discussion before the nation, on the fate of which much,—who can say how much?—of its liberty and prosperity depended, could not dwell on those insulated points, which we have now leisure to examine under all their aspects and in all their relations.

Taking the constitution then, thus understood, as our guide, we will examine those two classes, by which the 25th sect. of the judicial law is said to be completely justified.

Mr. Wirt is under some doubt as to the principle of construction, which ought to be applied to the constitution. He is at a loss to decide whether the constitution ought to be regarded as a compact or a statute, and seems to think that the rule of construction would vary according to the character of the instrument. Be it so.—But I will not stop to engage in this inquiry, nor enter into a detail showing in what parts the constitution of the United States ought to be considered as statutory or conventional. In relation to the present question, and in relation to the most important questions that have occurred, or can occur, it is neither the one, nor the other, but a grant of *power*—a grant of *power by the people*, for their own benefit only—not to any individual, or class of individuals, but to those among themselves whom they may think proper to select,

from generation to generation, for the administration of their national concerns. In this view of the subject, it is manifest that it would be idle to resort to any of those technical rules of construction, which relate to grants between individuals. The difference between this case and ordinary cases, is obvious and essential. In the latter there are two parties; neither of whom has a right to decide. The law therefore must decide for them. But in this case, there are not two parties.—In other countries, indeed, the governors and the governed form two classes distinct from each other in situation, feeling and interest. But here our constitution recognises no party but the people; and they who are called on to ascertain its meaning, ought to decide according to the real and obvious intention of those who are the source of all legitimate power—who gave and can take away—who created and can destroy.

But Mr. Wirt himself has repeatedly conceded the proposition, that no power ought to be exercised, but that which is expressly given, or is necessary to carry a given power into effect. After this concession Mr. W. might have spared himself the trouble, of searching further for the true principle of construction. He has granted all that the most rigid expounder of the constitution can require. He has conceded the very point contended for in the first preliminary remark addressed by me to the court—the point so clearly stated and so ably supported in the report of the committee of the legislature of Virginia, in the year 1799, in reply to the answer of the legislature of Massachusetts, to the resolutions of the preceding session. This report is so well known, and a knowledge of the principles which it inculcates so widely diffused, that it would be a waste of time, to go through the process, by which the proposition conceded by Mr. W. is demonstrated to be true.

This being our mutual understanding on this point, we both proceed to apply it to those claims of the constitution on which the present question depends.

The first clause relied on, is the first paragraph of the 2d sect. of the 3d. art. which is in these words:—"The judicial power shall extend to all cases in law and equity, arising under

this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects."

From these words, Mr. W. contends that congress have a right to *extend* the judicial power of the United States, to all the specified cases, according to their discretion. On this subject he advances a position, which I am not disposed to controvert. He advances as a position universally true, that where a power is given to congress, the mode of exercising that power is left to their discretion; and he illustrates his argument by putting a case, where a power is expressly given to congress—to provide for calling out the militia, which power he conceives, is to be exercised in the mode which they may deem most expedient. Without stopping to inquire whether many illustrations rather more opposite might not have been drawn from the constitution, I am ready to concede every thing which the argument requires.

Now it will be remembered, that on this very part of the subject, Mr. Wirt spoke with all his usual eloquence, and more than his usual confidence. He seemed suspicious that his opponents would shrink from this part of the inquiry. He therefore called peremptorily for a refutation of this argument, and challenged his adversaries to attempt it.

I accept this challenge, and offer, without hesitation, the following refutation:—His proposition is, that where a power is given to congress, they may exercise it in the mode which they deem best. This I have already conceded—but the concession is utterly worthless and unavailing to Mr. W. unless he can show, that there has been on this very subject, a delegation of power to congress. Unless he does this, he does nothing. He

does not bring his case within the operation of the rule, about which we are both agreed. Now the fact is, that in that part of the section now under consideration, there is no grant of legislative power. In the order of debate, this obvious point has been entirely overlooked. If instead of the words really used, the constitution had said, "*Congress shall have power to extend the judicial power of the United States,*" to the cases enumerated, there would have been some plausibility, perhaps force, in the argument, if the question turned on that clause only. But the constitution does not speak this language. The language really spoken, is essentially different; so far from amounting to a grant of legislative power, the mode of exercising which might be discretionary, like that of calling out the militia; it is a grant of judicial power only, which congress cannot touch. It constitutes a grant and definition of judicial power, incorporated in the federal government, over which congress has no control. They can no more alter this constitutional definition of judicial jurisdiction or power, than they can alter the constitutional definition of treason—a project once set on foot, but speedily abandoned.

The doctrine then for which I contend is simply this; that although it be true, that where power is given to congress to do a particular act, such, for instance, as borrowing money on the credit of the United States, the means of effecting this object, are entirely at their discretion, it does not follow, and is not true, that where no legislative power is given, where on the contrary, the constitution has itself defined the cases to which the judicial power of the United States shall extend, congress have any right to prescribe the mode in which it shall be extended.

It is certain that congress are not expressly authorized by the constitution to prescribe the mode, in which the judicial power of the United States, shall be extended to cases of federal cognizance—and it is equally clear, that the power ascribed to them by the argument of Mr. W. is not necessary to carry any power existing under the constitution into effect. If this be

true, the discussion upon Mr. Wirt's own principles is at an end.

To ascertain whether this be true or not, let us see how the judicial power will stand on the constitution alone, without this legislative power in congress.

The true meaning of the recited clause is, that the courts of the United States shall have cognizance of certain cases, not exclusive, but concurrent with the courts of the several states. It has never yet been contended, that the words "the judicial power of the United States shall *extend*," &c. gave to the federal courts, exclusive jurisdiction. The state courts had jurisdiction before. But for the federal government, that jurisdiction would have been necessarily exclusive. When, therefore, the constitution used the words before mentioned, it would mean no more than this: that certain classes of cases which before its adoption, must of necessity have been brought into the state courts, might be brought before the federal tribunals.—If brought there, the courts had jurisdiction over them by the express words of the constitution. But if they should be brought in the state courts, whose jurisdiction was anterior to the existence of the constitution, and entirely independent of it afterwards, they would be *rightly* in court, and might be finally *decided*. The jurisdiction, then, of the federal and state tribunals being concurrent, that is, standing on equal ground, each claiming to decide what is brought before it, and claiming no more, it is manifest that the words and meaning of the constitution are satisfied, if every case stated in the constitution can be originated in the federal courts; and it is equally clear that there can be no necessity for any sort of legislative interposition on the subject. The judicial power of the United States does not extend, in the proper sense of that word, that is, concurrently with the judicial power of the states, without the aid of the legislature, to all the enumerated cases.

But it may be said, that there is another argument, of a similar aspect, on this subject, which it may be more difficult to repel. It may be presented in this form. The constitution declares, that "the judicial power of the United States *shall ex-*

tend" to certain cases; and the 8th section of the first article, expressly authorizes congress to pass not only all laws necessary and proper, to carry into execution the foregoing powers; that is, the powers expressly granted to that body, but "all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." Congress, therefore, it may be said, have a right under this clause, to make a law for the purpose of extending this judicial power of the United States, to every class of the enumerated cases, although without the aid of such law, they would be inaccessible by federal jurisdiction.

I regret that in answering this argument, I am obliged to touch in my progress, at a point, not indicated in the invitation given by the court. It cannot, however, in this part of our journey through the cause, be easily avoided.

Now, let it be observed, that there are only two classes of cases, which are not within the reach of the federal tribunals, without the aid of a law; *two only*, that is, cases depending before, and cases decided by a state tribunal. All *other* cases of federal cognizance, are within reach of the judicial power of the United States, by the help of the constitution only. *These* two classes of cases, are to be placed there by law. Does not this fact, the necessity of passing a law to operate especially on them, show distinctly that they ought to have been left untouched? If the power of the constitution itself announced in these high terms, "the judicial power of the United States *shall extend*," does not bring these cases before the federal judiciary, can a law effect it? Can a law give jurisdiction where the constitution cannot?

The proposition that the federal and state tribunals, have a concurrent jurisdiction, in relation to the enumerated cases, never having been denied, will be assumed to be true. Now, in my humble opinion, as already expressed, concurrence implies, on this subject, equality: that is, that each court shall entertain jurisdiction of the cases originated before it, and this is its meaning in relation to the concurrent jurisdiction of the federal courts. Cases brought before *them*, are never removed

into the state courts. Cases decided by *them*, are finally decided. But, it seems that a little more is meant. In relation to the federal courts, it further means, that they may take cognizance of causes, removed from a state tribunal before trial, or revise them afterwards by appeal. It is not, moreover, apparent, that the same reasoning, which justifies the extension of the judicial power of the United States, to these cases, in this way, would justify its extension in any way, and give to congress a power to transfer by law, every case of federal cognizance, brought before a state tribunal, within the pale of the federal jurisdiction. According to the doctrine advanced by Mr. Wirt, as to the discretion of congress in selecting the mode of effecting an object, such would inevitably be the result.

But let us examine this point more minutely. "The judicial power of the United States shall extend," &c. Now, admit that congress have a right, under the 8th section, to make a law for the purpose of carrying into effect the judicial power of the United States. Let them have this power, and to what does it amount? The judicial power of the United States, is by the constitution, concurrent with that of the states, and so it must remain. But, this argument goes to show, that it may be exclusive and supreme.

A further remark on this point is submitted. The argument here controverted supposes that congress have a right to extend the judicial power of the United States to all cases in the enumerated classes, though depending before, or decided by a state tribunal. Thus, these words—"the judicial power of the United States *shall extend*," &c. mean that congress shall have power to pass laws for the removal into the tribunals of the United States, of causes depending before a state tribunal, and to give to the former an appellate jurisdiction over the latter. That a power, so delicate in its character, and so important in its effect, should have been intended to be conveyed in this covered, subterraneous way, it is impossible to believe.

It may also, with propriety, be said that the constitution of the United States, when speaking of the cases to which the judicial power shall extend, must be considered as referring to

existing cases. Now, cases decided cannot be regarded as existing cases. The original case is merged in the decision. A bond, on which a judgment is obtained, is swallowed up by the judgment.

It is, however, unnecessary to press this point more. According to my view of the subject, every argument founded on the clause of the constitution now reviewed, is irrelevant. The question before this court is, whether the Supreme court of the United States has appellate power over this court, the Supreme court of a state? Now this question is decided by a different clause of the constitution, by which the original, as well as appellate jurisdiction of the Supreme court is completely defined; and if, from a fair exposition, it appears that the Supreme court has not constitutionally appellate jurisdiction over the state tribunals, it is manifestly a waste of time to engage in a regular refutation of arguments, introduced to prove that congress will bestow it.

This brings us to the second ground taken by the counsel for the appellee. They say that the second paragraph of the second section of the third article of the constitution of the United States, in these words—"In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be party, the Supreme court shall have original jurisdiction; in all the other cases before mentioned, the Supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make,"—gives to the Supreme court of the United States an appellate jurisdiction over the tribunals of a state, as well as over the inferior tribunals of the United States.

Various considerations present themselves at once, in opposition to this doctrine. They shall be briefly stated.

1. The object of the constitution, in this clause, is obviously to designate the *cases* in which, and not the courts *over* which the Supreme court shall have appellate jurisdiction. There is not a word said about courts.

2. The power now claimed is of a character both delicate and peculiar: the first, because it is to be exercised by a department of one government over a department of another; and peculiar, because, as was before remarked, it introduces an anomaly into our system, which it was very easy to avoid. Now, is it to be believed that a power of this kind, if really intended to be given, would have been left to depend on conjecture or inference? This cannot be believed: on the contrary, the evidence to be collected from the constitution itself proves, that if this power had been intended to be conferred on the Supreme court of the United States, the terms used would have distinctly and expressly referred to it. The language would have been as clear as that of the following sentence:—"In all the other cases before mentioned, whether decided by an inferior tribunal of the United States, or by any court of a state, the Supreme court shall have appellate jurisdiction," &c.

An example of the evidence here alluded to is furnished by the very section before us. Although it might be fairly inferred, from this section, that congress were to ordain and establish inferior tribunals, yet a power for that purpose is expressly given, in so many words, by the eighth section of the first article.

Another example is furnished even by the clause itself. The constitution meant to bestow on the Supreme court a general appellate jurisdiction over its own inferior tribunals, both as to law and fact. It therefore says, that it shall have appellate jurisdiction, both as to law and fact.

Other instances of this kind might be selected; but these are sufficient. They show that where power was meant to be given, it was given in plain terms, and not left to be cunningly deduced, from general terms, actually applied to a different subject. Yet, in defiance of all this, and in defiance, too, of the general character and policy of the constitution, we are called on to say that the constitution, when speaking of the cases in which the Supreme court should have appellate power, was thinking of federal and state courts, and by these words meant to subject the latter to the jurisdiction of the former.

3. It has been conceded that power must be expressly given. Now, in the present case, there is not a single word expressly applicable to state tribunals.

But it may be said that the terms of the constitution, though general, are express, and that the general terms include this case. In illustration of this idea, it may be further said, that there is no express delegation to the Supreme court of appellate jurisdiction over the inferior courts of the United States; yet it has this jurisdiction over them.

The general terms of the constitution, therefore, embracing, as is admitted, an appellate jurisdiction over the inferior courts of the United States, may, on the same principle, be said to embrace the jurisdiction in question. This I conceive to be the strongest argument that can be urged, in support of the appellate pretensions of the Supreme court of the United States.

The considerations already suggested may be used with great force against the argument just stated. My own impression is, that they are conclusive. But there is an additional remark, too important to be passed by.

All words, oral or written, the construction of which is judicially, or even rationally investigated, must be referred to the subject matter. Although it be true that general terms are to be generally understood, still their generality must be restricted to the subject to which the speech or writing relates. Illustrations of this elementary and obvious principle would be superfluous in this court, and in ordinary cases, perhaps improper. But this is not an ordinary case; and the court will therefore indulge me, while I mention two, furnished, among many others, by the constitution itself—one of them by the section under consideration.

“The trial of *all crimes*, except in cases of impeachment, shall be by jury.” What crimes? The expression is general: there is no exception. Yet, that the constitution meant “all crimes committed against the United States,” it would be as idle to attempt to prove, as it would be absurd to deny.

“ In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district, &c.” It is equally clear that the words **“ all criminal prosecutions”** mean those only which are instituted on the part of the United States.

This plain reasoning at once detects and exposes the fallacy of the argument under consideration. The section on which it relies speaks of the judicial power of the United States only. The clause in question speaks of the courts of the United States only—the Supreme court of the United States, and such inferior tribunals as congress might establish. The relation between these courts, as supreme and inferior, is distinctly announced. They, and the distribution between them of the judicial power of the United States, constituted the subject matter. When, therefore, appellate jurisdiction is given to the Supreme court, that appellate jurisdiction must be considered as extended over the inferior federal tribunals, which had been mentioned, and not over state courts, about which not a word had been said.

This construction of the constitution, limiting the appellate power of the Supreme court to federal tribunals, is irresistibly enforced, by an argument deduced from the power given to congress to make such exceptions and regulations concerning it as they might deem proper. Is it not obvious that this appellate power was understood to be within the reach of congressional regulation and control? And is it not so, provided the restriction for which I contend be adopted? But if the appellate power of the Supreme court be extended to state tribunals, why then it follows that congress must have the power of regulating the proceedings of state, as well as federal courts; a power never yet exercised, nor even claimed, but, on the contrary, very distinctly disavowed. Congress, in relation to the appellate power of the Supreme courts over their inferior courts, have established several regulations. By the nineteenth section of the judicial act, they have directed that the facts shall appear on the record. By the thirtieth section, they have directed that the evidence shall be recorded, and authorized a

recourse to it, where the witnesses cannot be procured. These regulations, however, and indeed all prescribed by that act, relate exclusively to the federal courts. Not one word is said that has any relation to the state courts. The right of appeal from them is asserted, but no regulation is attempted. None; I mean affecting the trial or previous proceedings.

There is not only no regulation concerning appeals from the state courts, of the description just mentioned; but there is no attempt to provide a remedy, in case this appellate power should be controverted or opposed. Collision between the federal tribunals is foreseen, and the evil is corrected by mandamus or prohibition: but in case of collision between the federal and state tribunals, no remedy whatever is provided. The knowledge, on the part of congress, that no remedy could be provided, ought, it would seem, to have admonished them that they had gone too far.

This remark suggests another, not unworthy of notice. If the framers of the constitution had really meant to confer this appellate power on the Supreme court of the United States, they would not only have said so in plain language, but they would have provided some means for upholding the authority of the general government, in case of disagreement. A case of such importance would have been provided for in the constitution itself.

The foregoing arguments, if sound, establish the position, that, by the constitution, the Supreme court of the United States has no appellate jurisdiction whatever over the tribunals of a state. The argument now to be urged, is intended to show that, even if an appellate power does exist, it cannot be exercised in the manner and form prescribed by this mandate. This proposition, however, not being of much importance except in this case, will not be extensively discussed.

By the first section of the third article of the constitution, "the judicial power of the United States is vested in one Supreme court, and in such inferior tribunals as congress may, from time to time, ordain and establish." Being vested in them

by the constitution, it must remain in them exclusively and for ever. What the constitution has fixed, no law can change.

What then is the character of the power which this court is required to assume and to exercise? It is emphatically a judicial power. It is a power to enter upon record a judgment, although the record of this court shows that a judgment, final and conclusive, as far as the judicial power of the state vested in this court is concerned, has already been entered. In entering then the judgment prescribed, this court would not act by virtue of any judicial power derived from the state. That power has been exercised, and the judgment is beyond its reach. If then a new judgment is entered, the court must act, not by virtue of the judicial power of the state, but by virtue of the judicial power of the United States. But this is impossible, that power being by the court vested exclusively in the federal tribunals.

The difficulty will not be obviated by proving the act required to be done to be of a ministerial, and not of a judicial character, unless it can be also proved, that congress has a right to impose ministerial duties on the state judges. This will hardly be affirmed. Duties of this description cannot be imposed even on federal judges. This point has been settled by the judges of the Supreme court.

On this first question I shall add no more. Whatever the decision may be, the discussion will be useful. It is that sort of recurrence to fundamental principles, so forcibly recommended by our state bill of rights.

On the second question I have but little to offer. It was scarcely touched by Mr. Wirt, and I see no reason for departing far from his example.

Mr. Leigh's leading position is, that the Supreme court is alone competent to decide, concerning the extent of its own jurisdiction. His reasoning, I understand to be this: wherever there is a concurrent jurisdiction between the federal and state tribunals, they form so far one judiciary system; they constitute *one whole*. The Supreme courts of the United States being at the head of the system, must, like all other Supreme

courts, decide in the last resort; and that court having decided this question, no inferior tribunal ought to controvert the decision.

Every part of this proposition is pregnant with error. It is denied that the federal and state judiciaries form one system, or constitute one whole, on any ground whatever, and most especially on the ground of concurrent jurisdiction. The naked fact of concurrent jurisdiction implies no connexion. The county and corporation courts have a concurrent jurisdiction; but no relation, no connexion whatever. They are created by the same power, and amenable to the same government. Still there is no point of contact between them. But the federal and state tribunals derive their existence from different sources, and are amenable to different governments. Yet, according to Mr. Leigh, the fact alone of their having a concurrent jurisdiction, implies not only relation, but pre-eminence on one side. Now, in my estimation, it implies equality; and I see no more reason, taking this fact solely into view, for making the state courts parts of the federal judiciary, so as to give the latter an appellate jurisdiction over them, than for making the federal courts parts of the state judiciary.

Mr. Leigh appears to be mistaken, also, as to the fact that this question has been decided by the Supreme courts. The cases adduced by him I have since examined. They only prove that the jurisdiction now claimed has been exercised, but not that the question now discussed has been decided. In truth, the point was never presented to the court.

But if it had been decided after argument, this court would not be bound by the decision. The judges would approach it with great respect, examine it with great care, reflect upon it long and intensely; but after all they would decide as duty and conscience prescribed.

It is true that if this court were to decide any question concerning its own jurisdiction, the decision would be admitted by all the state tribunals, however exceptionable it might be deemed. It would be admitted, and ought to be admitted, because this is the Supreme court of the country; and this is the

Supreme court from no other circumstance than this—that it decides in the last resort, and has the power to enforce its decisions against all the inferior tribunals of the commonwealth. But Mr. Leigh's argument gratuitously bestows a supremacy on the Supreme court of the United States, in relation to this court, although the essence of the question is, whether it has that supremacy; that is, whether it has that appellate power which, it is conceded, would constitute a superior court.

But, supreme as this court unquestionably is, in relation to all the courts of this state, it has never yet said that it alone is competent to decide a question concerning the extent of its own jurisdiction. In fact, one court must often decide concerning the jurisdiction of another. If the court which decides happens to be an inferior court, its error, if it commit one, may be corrected. But still it has decided. If, for instance, a defendant should pray an appeal from the county court to this court, his application would be rejected. He would be told that this court has no immediate appellate jurisdiction over a county court; and the justices, I presume, would hardly think the counsel serious, who should tell them that they were undertaking to decide a question which this court alone was competent to decide. Illustrations of this doctrine might be furnished in great numbers; but it is unnecessary to suggest them to this court.

Before I conclude, I will notice a remark from Mr. Leigh, which ought to have been examined in a preceding part of this inquiry. He said it had been decided by this court, that a cause, depending in a state court against the citizen of another state, might be transferred before a federal tribunal; and he asked why this removal might not be effected after judgment.

It would be useless to repeat what has been already said concerning this power to remove before judgment. I will barely mention to the court, that in case of *Brown v. Cropper* and *Wise*, I was of counsel for the appellant, and, in fact, the only counsel in the cause; and I am perfectly assured that the case was argued and decided upon the law, and the law alone,

No doubt of its validity was suggested. In this statement I am justified, not only by my own recollection, but by the printed report of the case.

One more remark, and I have done. It has been eloquently urged that it is important that all questions, involving the construction of a treaty, should be decided by the national judiciary. It may be so; but the proposition is not conceded. Whether true or false, it is immaterial here. We are inquiring into the meaning of the court; not what the court ought to be. Those who formed the court were not of this opinion. If they had been, they would either have given an exclusive or an appellate jurisdiction to the court of the United States, in terms not to be misunderstood.

They did not believe, as has been contended here, that violations of treaties by judicial decisions constitute the most common source of wars. They knew better: they knew that wars spring from the ambition of princes, from an eagerness after wealth, as well as fame, always indulged by the military of a powerful nation, and more especially from the monopolizing and rapacious spirit which commerce never fails to inspire. In truth, no instance is recollected, in which a war has arisen from a decision supposed to be in contravention of a treaty. Judicial decisions are not between states and empires, but individuals. Their claims are too trivial, and themselves too obscure, to set in motion those strong feelings which impel nations into war. The people of this country did not wage war against Great Britain, because of the decisions of sir Wililam Scott, repugnant as they were, not to a treaty, but to the great law of nature and nations, the benefit of which may be rightfully claimed by all the people of the earth, but because of the orders of the British government—the orders in council, which established a new law of nations, as iniquitous as it was new, and which the judge thought proper to adopt and to enforce.

Cabell, J. This was originally, an ejectment brought by David Hunter against Denny Fairfax, in the Winchester district court, for a tract of land lying in that part of Virginia, commonly

called the Northern Neck. In that court, the parties, by their counsel, agreed a case which it is deemed unnecessary to set forth at large. It will be sufficient to observe that, upon the case agreed, it was contended, on the part of those claiming under Lord Fairfax, that Lord Fairfax being a citizen of this commonwealth, and seized in absolute fee simple of the lands in controversy, died in December, 1781, having devised his lands in the Northern Neck, including those in controversy, to Denny Fairfax; who, it was admitted, was born in England, in the year 1750, and had never become a citizen of Virginia, or of any of the United States. That the said Denny Fairfax was capable of taking and holding the lands devised to him, until divested by an inquest of office or some equivalent act; and that no such act had taken place prior to the treaty of peace made and concluded between Great Britain and the United States of America, which, it was farther alleged, protected his property and released any supposed right of the commonwealth to the lands in question.

On the part of Hunter, it was contended that Denny Fairfax, being at the time of the devise aforesaid, and ever after, an alien, was incapable of holding lands in this commonwealth; that admitting an inquest of office to have been necessary under the *general* laws as applying to ordinary cases, the several acts of Assembly stated in the case agreed, respecting the mode of acquiring titles to certain lands in the Northern Neck, were equivalent thereto, and supplied the place thereof, in relation to such lands, and justified the grant thereof, made by the commonwealth to Hunter on the 30th of April, 1789.

The district court of Winchester, on the 24th of April, 1794, gave judgment upon the case agreed, for Fairfax; whereupon, Hunter appealed to this court, and Denny Fairfax having died, the appeal was revived against Philip Martin, his heir at law and devisee.

The cause was argued in May, 1796, and re-argued in October, 1809; and judgment was rendered on 23d April, 1810, reversing the judgment of the district court. The entry on the order book then proceeds:—"And this court proceeding to give

such judgment as the said district court ought to have given, is of opinion, that the law arising on the case agreed in this cause, is for the appellant;" and judgment was accordingly entered for him. From Mr. Munford's *Report* of this cause, however, it appears that the two judges who decided it, were divided in opinion as to the effect of the several acts of Assembly, and the treaty of peace set forth in the case agreed, which division of the court would have amounted to an affirmance of the judgment of the district court. But the court advertng to the act of compromise of the year 1796, [*see Sess. Acts of 1796 and appendix to the 2d vol. Rev. Code, p. 71*] between the commonwealth, and the purchasers under Denny Fairfax, by which the purchasers, in consideration of a release by the commonwealth of its claim to "any land specifically appropriated by Lord Fairfax to his own use, either by deed or actual survey," agreed to release to the commonwealth "all claims to lands supposed to lie within the Northern Neck, which *were waste and unappropriated at the time of the death of Lord Fairfax;*" and it being admitted by the case agreed, that the lands in question were of this last description, and it appearing moreover that the purchasers had actually *availed themselves* of the said compromise, by reversing two judgments in favour of the commonwealth, and both judges concurring in opinion, *on the ground of the compromise;* the judgment of the district court was reversed, and judgment was entered for the appellant Hunter.

To this judgment Fairfax's devisee obtained a writ of error from the Supreme court of the United States, under the 25th section of the act of congress, passed the 24th of September, 1789, [*1st vol. Laws of the U. S. p. 63*] which declares, "that a final judgment or decree in any suit, in the highest court of law or equity of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or, where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the de-

cision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty or statute of or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party under such clause of the said constitution, treaty, statute or commission, may be re-examined and reversed, or affirmed in the Supreme court of the United States upon a writ of error, the citation being signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme court of the United States, in the same manner and under the same regulations; and the writ shall have the same effect, as if the judgment or decree complained of, had been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, except that the Supreme court, instead of remanding the cause for a final decision as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions or authorities in dispute."

The record having been carried by this writ of error into the Supreme court of the United States, that court reversed the judgment of this court, and affirmed that of the district court of Winchester, and ordered the cause to be remanded to this court, "with instructions to enter judgment for the appellant Philip Martin." By the mandate directed to this court, and reciting the judgment of the Supreme court of the United States, the judges of this court are "commanded that such proceedings be had in the said cause, as according to right and justice and the laws of the United States, and agreeably to said judgment and instructions of said Supreme court, ought to be had."

When the mandate was presented to the court, doubts were suggested whether the case comes within the intent and meaning of the provisions of the act of congress aforesaid, and admitting it does come within them, whether the provisions themselves are authorized by the constitution of the United States. The suggestion of these doubts was followed by an argument from the bar, elaborate, able and profound. According to the view which I have taken of the subject, however, I do not deem it necessary to give an opinion on all the points presented in the argument.

I shall not inquire whether this is such a case as is contemplated by the act of congress; I shall proceed upon the admission that it is so; that it is the case of a final judgment in the highest court of a state, in which a decision in the suit could be had; that the record shows that the construction of a treaty has been directly drawn in question, and that the decision has been against the title set up or claimed by one of the parties, under that treaty. In such a case, has the congress of the United States a right, under the federal constitution, to confer on the Supreme court of the United States, a power to *re-examine, by way of appeal or writ of error, the decision of the state court; to affirm or reverse that decision; and in case of reversal, to command the state court to enter and execute a judgment different from that which it had previously rendered?* I am deeply sensible of the extreme delicacy and importance of this question. I have diligently examined it according to my best ability, uninfluenced, I trust, by any other feeling than an earnest desire to ascertain and give to the constitution, its just construction; being as little anxious for the abridgment of the federal, as for the extension of the state jurisdiction. My investigations have terminated in the conviction, that the constitution of the United States does not warrant the power which the act of congress purports to confer on the federal judiciary.

It was justly observed, in the argument, that our system of government is *sui generis*, unlike any other that now exists, or that has ever existed. Resting on certain great principles which we contend to be fundamental, immutable, and of paramount

obligation, it will not be found to want any of the powers of legitimate government; but, the distribution and modifications of those powers have no parallel. To the federal government are confided certain powers, specially enumerated, and principally affecting our foreign relations, and the general interests of the nation. These powers are limited, not only by their special enumeration, but by the positive declaration that, all powers not enumerated, or not prohibited to the states, are reserved to the states, or to the people. This demarcation of power is not vain and ineffectual. The free exercise, by the states, of the powers reserved to them, is as much sanctioned and guarded by the constitution of the United States, as is the free exercise, by the federal government, of the powers delegated to that government. If either be impaired, the system is deranged. The two governments, therefore, possessing each, its portion of the divided sovereignty, although embracing the same territory, and operating on the same persons and frequently on the same subjects, are nevertheless separate from, and independent of each other. From this position, believed to be incontrovertible, it necessarily results that each government must act by *its own* organs: from no other can it expect, command or enforce obedience, even as to objects coming within the range of its powers.

But whilst, on the one hand, neither government is left dependent upon the other, for the exercise of its proper powers, so on the other hand, neither government, nor any of its departments, can act *compulsively* on the other or any of its organs, in their political or official capacities; with the single exception, perhaps of the case, where a state may be sued. In using the term *compulsive* action, I do not mean to restrain it to the idea of actual force, but to extend it to any action imposing an obligation to obey. The present government of the United States, grew out of the weakness and inefficiency of the confederation, and was intended to remedy its evils. Instead of a government of *requisition*, we have a government of *power*. But how does that power operate? On individuals, in their individual capacities. No one presumes to contend, that the state governments can operate compulsively on the general go-

vernment or any of its departments, even in cases of unquestionable encroachment on state authority; as, for example, if the federal court should entertain jurisdiction, in personal actions, between citizens of the same state, not involving questions concerning the construction of the constitution of the United States, nor concerning the validity or construction of any statute, treaty, commission or authority of, or under, the general government, nor concerning the validity of any statute, commission or authority of, or under, any state government; such encroachment of jurisdiction could neither be prevented nor redressed by the state government, or any of its departments, *by any procedure acting on the federal courts*. I can perceive nothing in the constitution which gives to the federal courts any stronger claim to prevent or redress, *by any procedure acting on the state courts*, an equally obvious encroachment on the federal jurisdiction. The constitution of the United States contemplates the independence of both governments, and regards the *residuary* sovereignty of the states, as not less inviolable than the *delegated* sovereignty of the United States. It must have been foreseen that controversies would sometimes arise as to the boundaries of the two jurisdictions. Yet the constitution has provided no umpire, has erected no tribunal by which they shall be settled. The omission proceeded, probably, from the belief, that such a tribunal would produce evils greater than those of the occasional collisions, which it would be designed to remedy. Be this as it may, to give to the general government or any of its departments, a direct and controlling operation upon the state departments, *as such*, would be to change, at once, the whole character of our system. The independence of the state authorities would be extinguished, and a superiority, unknown to the constitution, would be created, which would, sooner or later, terminate in an entire consolidation of the states into one complete national sovereignty.

If these principles be correct; if the two governments and their departments are separate, distinct from, and independent of each other, and neither can act directly and compulsively upon the other, there is an end of the question now before the

court: for the question is, in fact, whether the federal court can act directly on this court, by obliging it to enter a judgment not its own.

But this principle of the separation and independence of the departments of the two governments, deserves farther development. The writer commonly called the *Federalist*, and who has ably elucidated many of the principles of our government, lays down the position, that "the national and state systems are to be regarded as *one whole*." [Letter 82, p. 245, 246.] From this position, both he and the counsel for the appellee, have inferred the right of appeal from the state, to the federal courts. The position itself, however, is resumed without proof or illustration, nor is the sense in which it is to be understood, distinctly unfolded.

There is only one sense in which it is believed to be true. The national and state governments are the depositories of all the powers known to our system of government. In this view, they may, perhaps, be considered as one whole—But this proves nothing, and leaves us where it found us. We must resort to some other source to ascertain the distribution of those powers, and the relation which the parts of this whole, sustain towards each other. To justify the inference that has been deduced, it must first be proved that the parts are connected, and that the one is superior to, and has a direct, commanding and controlling power over the other—which is the very point in controversy. It may farther be observed that the courts of the United States derive their power from, and owe responsibility to the people of the United States; whereas the state courts derive their power from, and owe responsibility to the people of their respective states. They emanate from different sources, and have no common or connecting head.

I can perceive no force in the argument attempted to be drawn from the sixth article of the constitution of the United States, which declares that the constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby. From this obli-

gation no exemption will be claimed for the state courts. But it imposes a subjection to the constitution, and to the laws and treaties made under its authority; not a subjection to the federal courts. What that constitution is, what those laws and treaties are, must, in cases coming before the state courts, be decided by the state judges, *according to their own judgments and upon their own responsibility.*—To the opinions of the federal courts, they will always pay the respect which is due to the opinions of other learned and upright judges; and more especially when it is considered that all the cases of federal cognizance, may, I shall hereafter endeavour to prove, be originally carried before the federal courts, and probably would always be carried there, unless there should be a conformity between the decisions of the state courts and of the federal courts. The courts of this state have furnished repeated evidence of this respect for the decisions of the federal courts—but it is *respect only*, and not the acknowledgment of *conclusive authority*.

Such are my conclusions from the general character and principles of our institutions. They are strengthened and confirmed by an examination of the particular clauses of the constitution concerning the judiciary.

The first section of the third article declares, that “the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish. The judges both of the supreme and inferior courts shall hold their offices during good behaviour, and shall at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.” The obvious meaning of this clause is, to designate the *organs* by which the United States are to exercise the judicial powers with which they are invested. These organs are federal courts; held by judges commissioned by the president of the United States, independent by the stability of their compensation and of the tenure of their offices, and responsible by their liability to impeachment and trial before the senate of the United States for misbehaviour in office.

If this court should now proceed to enter a judgment in this case, according to the instructions of the Supreme court,

the judges of this court, in doing so, must act either as federal or as state judges; but we cannot be made federal judges, without our consent, and without commissions. Both these requisites being wanting, the act could not, therefore, be done by us constitutionally, as federal judges. We must, then, in obeying this mandate, be considered still as state judges. We are required, as state judges, to enter up a judgment, not our own, but dictated and prescribed to us by another court. This, as to us, would be either a judicial or a ministerial act. If it be the latter, I presume it will not be contended that the federal court has the right to make the judges of this court its ministerial agents. Let it then be a judicial act. But before one court can dictate to another the judgment it shall pronounce, it must bear to that other the relation of an appellate court. The term appellate, however, necessarily includes the idea of *superiority*. But one court cannot be correctly said to be *superior* to another, unless both of them belong to the same sovereignty. It would be a misapplication of terms to say that a court of Virginia is *superior* to a court of Maryland, or *vice versa*. The courts of the United States, therefore, belonging to one sovereignty, cannot be appellate courts, in relation to the state courts, which belong to a different sovereignty; and, of course, their commands or instructions impose no obligation.

The second section of the third article enumerates the cases to which the judicial power of the United States shall extend; and the eighth section of the first article declares that congress shall have power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the general government, or any department thereof. But this effectuating power, as it has been termed, must of necessity be limited to constitutional means. In relation to judicial powers, these means have been already shown to be federal courts, and judges duly commissioned. But the act of congress now under consideration attempts, in fact, to make the state courts *inferior federal courts*, and to exercise, *through them*, jurisdiction over the subjects of federal cognizance.

The state jurisdiction had expended itself on the rendition of the judgment heretofore pronounced, or rather was suspended by the writ of error awarded to that judgment. All that has been subsequently done has been confessedly nothing more than the exercise of federal jurisdiction, in a federal court; and if we were now to obey this mandate, it would be only a continuation of the same jurisdiction; it would be the same court, pronouncing its judgment through us, who, not being commissioned, are not bound nor authorized to become such organs.

The constitution next speaks of the *jurisdiction* of the federal courts, as *original* and *appellate*. "In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state may be a party, the Supreme court shall have original jurisdiction. In all the other cases before mentioned, the Supreme court shall have appellate jurisdiction." I have already endeavoured to show that, on general principles, no court of one sovereignty can be said to be superior or supreme, in relation to the courts of another sovereignty. If, therefore, I am correct in this position, the appellate jurisdiction of the Supreme court of the United States must have reference to the inferior courts of the United States, and not to the state courts. But, putting this general principle out of view, it would seem impossible that the clause under consideration could admit of any other rational construction. The first clause of the third article, before mentioned, speaks of the different courts, in which the judicial power of the United States shall be vested as *superior* and *inferior*; the next enumerates the cases to which that judicial power shall extend; and the one now under consideration, resuming the subject of the courts, speaks of the jurisdiction of the *Supreme* court as *original* and *appellate*. The term *supreme* must be understood in reference to the *inferior* courts immediately before mentioned; and it must be in relation to them, and not to the state courts, that the *Supreme* court is to exercise appellate jurisdiction. It has been contended that the constitution contemplated only the objects of appeal, and not the tri-

bunals from which the appeal is to be taken; and intended to give to the Supreme court of the United States appellate jurisdiction, in all the cases of federal cognizance. But this argument proves too much, and what is utterly inadmissible: it would give appellate jurisdiction, as well over the courts of England or France, as over the state courts; for, although I do not think the state courts are *foreign* courts, in relation to the federal courts, yet I consider them not less *independent* than foreign courts.

If the appellate power now claimed for the federal courts is given by the constitution, it is, unquestionably, not given in express terms, but is only deducible by inference and implication. Let us attend, for a moment, to the effects and consequences of such a power. The counsel for the appellee claimed for the federal courts, not only the power to determine, finally and conclusively, all cases which might be carried before them in a due course of appeal, but also a right, as resulting necessarily and inevitably from the very nature of appellate power, to determine finally and conclusively on the extent of their own jurisdiction. My impression is, that this right would necessarily result from the grant of appellate power. The right to determine the question of jurisdiction, or, in other words, the cases to which the appellate power extends, must rest somewhere: it must be vested in the inferior, or in the appellate court. To vest it in the inferior court would be to invert the order of nature, to make the *inferior* greater than the *superior*. It would be to repose more confidence in the *inferior* court, from whose judgment an appeal is allowed, than in the *superior* court, which has power to reverse the judgments of the inferior, and would often defeat the object of the grant of appellate power. It has accordingly, been the uniform practice of all appellate courts to decide their own jurisdiction, in relation to the courts as to which they are appellate; and the practice has been uniformly submitted to by the inferior courts. Can it be believed that a power, involving such consequences, which would thus place the state courts at the feet of the federal courts, and make them the unwilling

instruments of their usurpation of state rights (should such usurpation ever be attempted); can it be believed that such a power, if it had been intended to be given, would have been granted by implication and inference only?

It was contended, by the counsel for the appellee, that if the appellate power of the federal courts be denied, there will be no other mode by which congress can extend the judicial power of the United States to the cases of federal cognizance; that there will, consequently, be no uniformity of decision; that the general government will be deprived of the power of executing its laws and treaties; that the purposes for which that government was adopted will be defeated, and that, in many instances, the peace of the country will be endangered. If these evils were to follow our decision, I should nevertheless be constrained to pronounce it, convinced as I am that the defects of our system of government must be remedied, not by the judiciary, but by the sovereign power of the people. But I cannot perceive that any such evils are likely to arise. The powers vested by the constitution in the congress of the United States, were delegated for purposes essential to the general welfare, and ought not to be defeated or impaired; and I have no doubt that one of these powers is that of making all laws, necessary and proper for extending the judicial power of the United States to *all* the cases to which the constitution declares that that power shall extend. I must not, however, be understood as impeaching the concurrent jurisdiction, *original* and *final*, of the state courts, *provided the parties shall elect that jurisdiction*. I do not understand the counsel for the appellee as denying the concurrent *original* jurisdiction of the state courts, nor can I perceive any better reason for denying their *final* jurisdiction, in all those cases which the parties shall submit to their decision. All the purposes of the constitution of the United States will be answered by the erection of federal courts, into which any party, plaintiff or defendant, concerned in a case of federal cognizance, *may* carry it for adjudication; for it was never intended to force the parties into those courts, against their will. The right of the *plaintiff* to have his case tried before the federal courts is unquestion-

able, as he may institute his suit in the state or federal courts, at his own option; and it will be sufficient for the *defendant*, sued in a *state* court, if the act of congress shall give him the power, to remove the case, at any time before judgment, into the federal courts. I cannot doubt that congress may give this power, consistently with the constitution; for, otherwise, the judicial power of the United States might be eluded, at the pleasure of any plaintiff. If, then, the plaintiff shall *elect* the state jurisdiction, by bringing his suit in the state court, and the defendant shall also *elect* it, by submitting to it, they must, from the nature of the judicial power reserved to the states, be *concluded* by the judgment, unless there be an appeal to some superior court, which I have endeavoured to show is not the case with respect to the federal courts. If, after a judgment in a state court, in any such case, there shall be complaints of a want of uniformity of decision, of a defective execution of the laws of the union, of a violation of rights under the constitution, laws, or treaties of the United States, or complaints of any other kind whatsoever, the answer to them all, both in relation to foreigners and others, is, that the parties have elected their own tribunal—a tribunal over which the general government has no control, and for whose decisions, therefore, it owes no responsibility.

Upon every view of the subject which I have been able to take, I am of opinion that the writ of error was improvidently awarded, and that this court should decline obedience to the mandate of the Supreme court of the United States.

Brooke, J.—This cause, having been finally decided in this court, comes back on a mandate from the Supreme court of the United States, wherein the judgment of this court has been reversed. By this mandate it is required that such proceedings be had, in the said cause, as according to right and justice, and the laws of the United States, and agreeably to the judgment and instructions of the said Supreme court, ought to be had.

The question that arises out of this mandate, and which is now to be decided by this court, is certainly a very delicate one, and ought to be approached with great deference, for the

opinion of the Supreme court of the United States; but, as the decision of it involves in it a high duty on the part of this court, it must be examined under a proper sense of the obligation which that duty imposes. As preliminary to any investigation of the power of the Supreme court under the constitution of the United States, and the act of congress which has been relied on, to issue the mandate in question, it has been urged by the counsel who support it, that the opinion of the Supreme court is conclusive upon this court: that having decided on the constitutionality and legality of its own powers, it would be an inversion of the due subordination of an inferior to a superior tribunal, to question its authority. The obvious objection to this argument is, that it assumes the proposition which is denied, and begs the question that is to be decided.

If it were admitted that this court is an inferior court, in relation to the Supreme court of the United States, and that both courts were but parts of the same system, in the sense now contended for, it would seldom happen, that the mandate of the superior to the inferior would be questioned. Yet, under that state of things, if it were permitted to argue from the abuse of power, cases might be put in which the power of the Supreme court might be so irregularly exercised, as to compel the inferior court to disobey its writ. Where power is not unlimited, however high the tribunal invested with it, subordination must be limited; and there will be a point at which obedience will end, and resistance begin: nor does this course of reasoning involve in it any insubordination of the inferior to the superior:—Where the power or jurisdiction of the latter is admitted, there is still a wide field for the exercise of its superiority, having the exclusive right to decide on the law and right of the case.

The preceding remarks will be entitled to more weight, when it is recollected that it has never yet been contended that the Supreme court can take jurisdiction of all the cases that may come within the jurisdiction of this court.—It can take jurisdiction, under the constitution of only a part of the sub-

jects of jurisdiction here; yet, according to this argument of implicit obedience to its mandates, it may sweep away the whole of the jurisdiction of this court, as the Supreme court of the United States, and, contrary to the plain letter of the constitution, which gives that court *some* jurisdiction, take *all*. The question then, must occur here, whether the Supreme court, under the authority of the 25th section of the act of congress to establish the judicial courts of the United States, has exercised a power not belonging to it, under the constitution of the United States. That question may be general or particular. The general question is, has the Supreme court the power to issue its mandate to this court in any case? The particular question will be, has it that power in the case before us? Unless the general question shall be decided in its favour, it will be unnecessary to examine how far it has transcended its power in the case under consideration.

In deciding this first question, recurrence must be had to the constitution itself; for, though I subscribe to the doctrine of one of the counsel, that, to the extent, that the states have parted with their power, they ought to part with their pride, yet I cannot as implicitly assent to the position that, when state rights are violated, they can only be defended in the general government, in congress, or by appealing to the people. The state authorities have been said, with great force, to be the guardians of the people's and their own rights. The right to resist infractions of the federal constitution proceeding from the general government, or any department thereof, has been solemnly asserted in Virginia, [*see Resolutions in 1799*] and seems to result from the nature of the two governments. In the work, entitled the "Federalist," so much relied on, in the argument, for sound exposition of the constitution, [*vol. 2, p. 26,*] it is said that, among a people consolidated into one nation, an indefinite supremacy over all persons and things, so far as they are the objects of lawful government, is completely vested in the national legislature; but, among communities, united for particular purposes, it is vested partly in the general, and partly in the municipal legislatures: in the former case, all local authorities are subor-

dinate to the supreme; in the latter, the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them within its own sphere.

In this relation, the federal government cannot be deemed a national one, since its jurisdiction extends to certain enumerated objects only, and leaves to the states a residuary and inviolable sovereignty over all other objects. This, as a general exposition of the constitution, appears, to me, perfectly correct:—it ascertains, upon principles that result from the relation in which the national and state governments stand to each other, the complete independence of each; principles, which were again recognised in the resolutions passed by the assembly of Virginia, in 1799, and which were before alluded to. Looking into the constitution with these lights, I have not been able to perceive in it any ground for the position that the state authorities can be controlled by the general authority, or any portion of it, nor that the latter has the power to establish the tribunal which is to decide controversies between them, without any appeal by the former to that instrument. That appeal will now be made; and, in making it, I shall pass by the preamble to the constitution, because I cannot perceive that any inference can be drawn from it favourable to the claim of power now set up: of which I am the more confident, inasmuch as it has not been resorted to, in the work before cited, for that purpose; and because also, the construction given to that part of the instrument by the report, on which the resolutions before referred to were founded, has generally been admitted to be correct. That construction restricts the means of obtaining the great objects, proposed in the preamble, to the special grant of power which are to be found in the constitution. The 3d article of the constitution is an example of those means, particularly applying to the case under consideration. It declares, that “the judicial power of the United States shall be vested in one Supreme court, and such other courts as the congress may from time to time ordain and establish: the judges both of the Supreme and inferior courts

shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office." How it is possible to extract from any expression in this article an authority to this court to exercise any of the judicial powers of the United States, I have not been able to perceive. That the state courts by any reasonable construction of the article, can be included in it, I think impossible. They are not ordained or established by the congress; nor is there any thing in the general tenure of the offices of the state judges, which can bring them within its operation. They are not responsible to the general government for the performance of their duty; and irresponsibility to that power which imposes a duty, would be a new principle obviously incompatible with the acknowledged principles of our institutions.

The authors of the work referred to, admit, [p. 223,] that the article recited, wears the appearance of confining the causes of federal cognizance to the federal courts, and deduce from it a different conclusion by a train of reasoning which seems to confound judicial power with the subjects that may come within its cognizance. The appellate power of the Supreme court of the United States, which is defined in the 2d section of the article, is not confined to cases decided in the inferior federal courts, to which it plainly refers, but is supposed to extend to all cases of the same description in whatever court they may have been decided, as if the decisions of courts founded on the *lex loci* necessarily subjected them to the appellate jurisdiction of the government, the laws of which may come in question. The words of the 2d member of that section are, "in all cases affecting ambassadors, other public ministers and consuls, &c. the Supreme court shall have original jurisdiction:" in all the other cases before mentioned, the Supreme court shall have appellate jurisdiction, both as to law and fact. The obvious relation which appellate power, vested in the Supreme court by the foregoing expressions, bears to the inferior tribunals, to be ordained and established by congress in virtue of the first section of the same article, is too manifest to be questioned: but,

this construction is fortified by other considerations. The appellate jurisdiction is given both as to law and fact, and without power in congress to regulate the proceedings in the state courts, if extended to those courts, would be impracticable, according to the common law rule of trial, which prevailed in most, if not all, of the state courts.

An appeal from the facts would be impossible, without a re-examination of the witnesses from remote distances, or by depositions, in violation of the practice in most, if not all, of the state courts. The 9th article of the amendments to the constitution, furnishes additional light on this view of the subject. Plainly referring to the courts of the United States, it declares that, at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law. The objects of this amendment are, first, to preserve the trial by jury in the federal courts; and, secondly, to take from those courts the power of re-examining any fact, tried by a jury, otherwise than according to the principles of the common law. The two provisions, taken in connexion, as they are found in the article, exclude the idea of the relation of either of them to the state courts; a circumstance of considerable weight, when it is considered that one of the objects is to regulate the proceedings in the federal courts founded on the appellate power both as to law and fact, derived from the 3d article before referred to. I conclude, therefore, that neither from the letter, nor from a view of any practicable result, can a construction be given to that article which could extend the appellate jurisdiction of the Supreme court to the state courts. My confidence in the correctness of that conclusion would be somewhat diminished, if I could possibly foresee all of the dangerous consequences that have been anticipated by the counsel who contend for the authority of the Supreme court. The power which is given to congress to ordain and establish inferior courts, was evidently intended to enable the national government to institute in each state or district of the United States

a tribunal competent in the determination of all matters of national jurisdiction within its limits, whenever deemed necessary by congress.

To have relied on the state authorities, as the means of exercising its most essential powers, would have totally changed the character of the national government, and reduced it to a state of imbecility little short of that of the former confederation. The great and radical vice in that system was in the principle of legislation for states or governments, as contradistinguished from the individuals of whom they consist. On a nearer view of the present system, it will be found to have escaped the enfeebling consequences of that principle; for though, in relation to the objects and limitations of its powers, and to the sources from which it derives those powers, it may be deemed a federal government; yet, in relation to the objects on which it operates, it is certainly a national one. Legislating for individuals, it contains, within itself, [see the *Federalist*] every power requisite to the complete execution of the trust confided to it, free from every other control, but a regard to the public good: and the sense of its constituents. The argument, then, that, unless the state courts admit the right of appeal to the Supreme court, the great rational objects of the federal government will be unattainable, loses all its force. If it were true, that the cases of national jurisdiction enumerated in the constitution could be finally and conclusively decided in the state courts, without power in the general government, through its own courts, to take jurisdiction of those cases either before or after those decisions, as it may be important to the nation, there would be some cause for alarm—but the foregoing remarks lead to no such conclusion.*

* The effect of the extension of the appellate power of the Supreme court to the state courts, will be found on a slight consideration to be more repugnant to the federate character of the national government than is at first supposed: it will give to it a strong feature of consolidated government in the administration of the laws and acts of the federal government. On the one hand, whilst the government of the United States will operate more evenly in the exercise of its constitutional powers, through organs not di-

The principle on which the state courts take jurisdiction of the cases enumerated in the constitution, is common to all courts having jurisdiction of the controversy before them. They decide in conformity to the law of any government that may come in question.* This principle does not deny to the federal government, in common with other governments, through its own courts, to decide the same case where the parties are within its jurisdiction. Without the means of enforcing and giving, to its treaties, its laws, and its acts, an uniform construction, it would be incompetent to attain the great objects of its institution. Moving within the circle of its constitutional powers, its authority will be exercised, in a great degree, without the range of the state authorities. The difficulty which presents itself to the operation of the general and state governments, on the same objects, has been felt in many cases: but it is one which grows out of the system itself, and, without a change of that system, cannot be entirely obviated.—That it may be much diminished by a prudent exercise of the powers appertaining to each, has been proved by experience. Legislating for individuals who are equally the citizens of the

rectly under its control—On the other hand the state courts will be made the instruments of encroachment on state rights, in a way to give greater force to violations of the federal compact, than if the general government committed those violations through its own organs. The revision of the judgments of the state courts, by way of original jurisdiction in the federal courts, will be unaided by the co-operation of state adjudications, and leave to the people, uninfluenced by state authority, an opportunity better adapted to the impartial investigation of the constitutionality of federal adjudications.

* The duty imposed on the judges of the several states, by the 6th article of the constitution, to respect the constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, as the supreme law of the land, adds nothing to the jurisdiction of the states courts over this subject.—It may authorise the federal courts, when the judgments of state courts come before them, to allow to those judgments less force than is generally accorded to the judgments of foreign courts, for the consequence of which, the federal government is not responsible.

general and state governments, the authority of that government must be considered as paramount, which under a fair construction of the constitution has the conclusive power to act or to legislate on the subject. The oath to support the constitution, with the strong responsibility to those from whom all power is derived, seem to be the only sanctions against the exercise of power not given by the people. That oath, which is prescribed by the sixth article, imposes no subordination upon those to whom it is administered—it is common to all who exercise power under either government. The obligation which is imposed by the same article on the judges in all the states to respect the constitution, the laws and all treaties which shall be made under the authority of the United States furnishes no ground of objection to the preceding remarks. It cannot be construed to give to the Supreme court power to enforce the responsibility of the state judges under that obligation. The article implies nothing more than it declares; that is, that the constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. On the contrary, it leaves to the state judges the right to inquire whether the laws, treaties, &c. have been made in pursuance of the constitution. Standing on the ground of that article alone, if there was no other, I should feel myself compelled to inquire whether the 25th section of the act of congress, under the authority of which the mandate in question was awarded, is in pursuance of the constitution, or repugnant thereto.—On the ground of mere implication, or doubtful inference, to decide that a law is unconstitutional, would at all times be highly improper. The judge ought to be deeply impressed that the law in question is in direct opposition to the plain meaning of that instrument; and, feeling that impression, he would be unmindful of the great trust confided to him, and of the sacred obligations of duty, if he were to shrink from the decision. Under the full influence of that impression, I am constrained to declare it to be my opinion that so much of the 25th section of the act of congress, in pursuance of which the

mandate in this case was issued, as requires of this court to exercise the judicial powers therein prescribed, is a violation of the constitution; that the writ of error was improvidently allowed by one of the judges of this court; and that obedience to the mandate ought to be refused.

Roane, J.—This case comes before the court, upon a special mandate from the Supreme court of the United States. That mandate recites a judgment of that court, which reverses a judgment of this court, and commands the judges of this court, to carry the reversing judgment into execution. That judgment was rendered upon a writ of error, sued out to the judgment of this court, under the provision of the 25th sect. of the judicial act of the United States, [*Laws of United States, vol. i. p. 64.*] upon the ground, as is supposed, that this court had decided against a treaty, or a right claimed under a treaty. The judgment of this court had reversed a judgment of the district court of Winchester, rendered in favour of Denny Fairfax, under whom the appellee, (Martin,) claims, in an action of ejectment, brought against him by the appellant, and had required the court below, to carry the same into execution. In that action a case was agreed between the parties, in which the defendant relied upon the treaty of peace between the United States and Great Britain: but that treaty constituted only one link of his defence or title. There are also many other distinct facts, or findings, comprised in the case agreed, each of which is, perhaps also divisible into other facts or findings; and as the judgment of this court, as appearing on the record, is merely *general*, and does not state the particular point on which it was rendered, it may be,—as the fact really was, in relation to the judgment of *this* court,—that neither judgment was rendered upon the construction of the treaty.

The question which now arises, upon this mandate, is of the first impression in this court, and of the greatest moment.—The court, consequently, invited the members of the bar to investigate it, for its information; several of whom, in addition to the appellee's counsel, discussed it, accordingly, in a very full and able manner: since which, it has received the long and

deliberate consideration of the court. This course of the court, to say nothing of its general character, should have spared the appellee's counsel the trouble of exhorting—not literally, but in effect,—this high tribunal, to divest itself of all improper prejudices, in deciding on this important question. Those counsel were also pleased to warn us of the consequences of a decision, one way, in reference, principally, to the anarchical principles prevalent at the time of the argument, (April, 1814,) in a particular section of the union. They ought to have remembered, that this court did not select the time for bringing this case to a decision,* and that it is not for it, to regard political consequences, in rendering its judgments.—They should also have recollected, that there is a Charybdis to be avoided, as well as a Scylla; that a centripetal, as well as a centrifugal principle, exists in the government; and that no calamity would be more to be deplored by the American people, than a vortex in the general government, which should engulf and sweep away, every vestige of the state constitutions.

I will consider the case before us, under the following general points of view:

I will inquire, 1st, whether the 25th section of the judicial act, so far as it relates to the case before us, is justified by the constitution? 2dly, Whether this case comes within the actual provision of that section? and 3dly, Whether this court has power to declare the negative of both or either of these propositions, if its opinion should incline it to do so?

Before I go particularly into these questions, it may be proper to rid the case of the influence of a number of *opinions*, which were quoted by the appellee's counsel. Among many others of minor character, and which, *therefore*, will not be particularly noticed, they were pleased to quote very much at large, the opinions contained in the publication styled *The Federalist*, and those delivered by the members of congress, at the time of passing the act in question. While I shall never hold myself bound, by the opinions of any individuals, further

* This opinion was prepared, and ready to be delivered, shortly after the argument. The crisis alluded to by the appellee's counsel, has now happily passed away.

than they appear to me to be correct, it may be proper to give an answer to the pretensions of such as challenge a superior degree of confidence. Of this character, the two classes of opinions just mentioned, may plausibly be supposed to partake. With respect to the work styled *The Federalist*, while its general ability is not denied, it is liable to the objection, of having been a mere newspaper publication, written in the heat and hurry of the battle,—if I may so express myself,—before the constitution was adopted, and with a view to ensure its ratification. Its principal reputed author was an active partizan of the constitution, and a supposed favourer of a consolidated government.* It is also liable to the objection, that while it contains an ample stock of principles, to bear out every opinion I have formed on this subject, its conclusions, in relation to the particular question now before us, go to prove too much; they go to authorize an appeal from the highest state courts, to the *inferior* federal tribunals!† With respect to the opinions of the members of congress, who passed the judicial act, I had not expected that *they* would have been quoted to prove it constitutional. Their opinion was already manifest, in the act itself, and it required the opinions of *others*, at least to corroborate and support it. The reiterated opinions of the

* See the report of the secretary of the treasury (Mr. Hamilton,) on manufactures, of 5th December, 1791; in which it is expressly contended to belong “to the discretion of the national legislature, to pronounce upon the objects which concern the GENERAL WELFARE, and for which, under that description, an appropriation of money is requisite and proper; and,” he adds, “there seems to be no room for a doubt, that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce, are within the sphere of the national councils, as far as regards an appropriation of money!”

† In 2d *Federalist*, p. 326, it is said, that whether the jurisdiction of the inferior federal courts shall be original, or appellate, or both, depends on the discretion of the legislature, and the author adds, “I perceive at present no impediment to the establishment of an appeal, from the state courts, to the SUBORDINATE national tribunals.”—Again it is said, in p. 327, that appeals, in most cases in which they may be proper, “instead of being carried to the Supreme court, may be made to lie to the DISTRICT COURTS of the union!”

same men, gains nothing, on this question of constitutionality, whereas the opinions of *others*, however insignificant, might have been of some importance, to show a concurrence of sentiment, on the subject. This quotation however proves another thing tending, essentially, to weaken the authority of these opinions. It shows that the judicial act, in all its parts, received far less discussion in congress, at the time it was passed, than the single point now in question, has received in this court. That point was not then considered or discussed, in an individual insulated manner. This was, perhaps, unavoidable, as the whole government was to be then, forthwith, organized, and time was very pressing.—It is not wonderful, therefore, that an act passed under such circumstances, should be found to have violated the constitution, in some of its parts; an instance of which has been detected and admitted, by the Supreme court of the United States itself, in the case of *Marbury v. Madison*. [1 *Cranch*, p. 176.]

It was argued by the appellee's counsel, that both these classes of opinions were entitled to great weight, as being contemporaneous expositions of the constitution, by men who had a great agency, in forming and putting the same into operation. Whatever weight may be attached to contemporaneous exposition, in other cases, little credit is certainly due to the constructions of those, who were parties to the conflict, and which were given before the heat of the contest had subsided, or their passions had had time to cool; and as to the advantages supposed to have been gained, from their having founded the constitution, which is expounded, that circumstance is in entire conflict with a principle, deemed vitally important to free government, by all enlightened writers, *The Federalist*, not excepted, (2 vol. p. 1.) that the power of making and expounding a law, or constitution, should not be blended in the same hands.

Throwing out of view, all these opinions, therefore, except so far as I may think them correct, and use them for the purpose of illustration, and taking for my guide the constitution, which cannot err, I will examine these important questions. I will also avail myself of such principles, as all the enlightened

friends of liberty concur in, as essential to preserve the rights and promote the harmony of both governments. As a work containing a just exposition of these principles, I will occasionally refer to the celebrated report to the Virginia legislature, in the year 1799. In addition to other claims to respect, it is to be remarked, that this document contains the *renewed* sense of the people of Virginia, on the important subjects to which it relates; a sanction deemed important enough, in some of the states (see const. of Maryland,) to cause an amendment to their constitutions, and that it had a principal influence in producing a new era in the American republic.

I. We come now to inquire, whether the 25th section of the judicial act, so far as it relates to the case before us, is justified by the constitution? and this question again branches itself into two inquiries: 1st. Whether the constitution gives any power to the Supreme court of the United States, to reverse the judgment of the Supreme court of a state? and 2dly, If it does, whether it authorizes the limited and partial power of revisal, contemplated by that section? I beg it to be distinctly understood, that I confine my inquiries, *exclusively*, to the actual point now under consideration; namely, one relating to the construction of a treaty. I do not stop to inquire, whether a controlling power exists in the Supreme court, in relation to *any other* class of jurisdiction, embraced by the 2d section of the 3d article of the constitution. It *may not* follow that because these are comprehended in the same article with the one before us, they necessarily stand upon the same, and no other foundation. It is *possible*, that various considerations, resulting as well from other provisions of the constitution, as from the nature of some of the other classes of jurisdiction, may occasion a difference. On these points, however, I have not stopped to form an opinion—I confine my inquiries to the single question now actually before us.

In order to understand that question correctly, it is proper to recollect, that the government of the United States is not a sole and consolidated government. The governments of the *several* states, in all their parts, remain in full force, except as

they are impaired, by grants of power to the general government. It is not only true, on general principles, that this may be the case of governments in general, but all the enlightened friends of liberty agree that it is, emphatically, the case, as to our confederated government.

As a proof of the first position, it is laid down in Vattel, (p. 18.) that several sovereign states may unite themselves together, by a perpetual confederacy, without each, in particular, ceasing to be a perfect state—that they will then form a federal republic, and as such, will remain independent, but will continue liable to fulfil the engagements, into which it has entered. As to our own particular government, this position is not, at this day, necessary to be proved. It has grown into a maxim. It has run through the general government, in all its modifications and changes—from the articles of confederation in which it is declared (art. 2d.) that “each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not, by this confederation, expressly delegated to the United States, in congress assembled,” to the present constitution of the United States, which has provided by the 12th amendment, that “the powers not delegated to the United States, by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”—And even in the short interval between the extinction of the articles of confederation, and the adoption of the amendment, last mentioned, the principle embraced by that amendment, was esteemed by all parties, as a part of the constitution itself. [2. *Federalist*, p. 202.]

If, after the explicit amendment last mentioned, any doubts could still exist, on this subject, they will be dissipated by the most unexceptionable authorities. In the report to the Virginia legislature, before mentioned, for example, that body has resolved [*Report, commonly called Madison's Report*, p. 4—5.] that “it views the powers of the federal government, as resulting from the compact to which the states are parties, as limited by the plain sense and intention of the instrument, constituting that compact; and as no further valid than they are authorized

by the grants enumerated in that compact." Again, it is resolved, [*p* .7] that "if the powers granted be valid, it is because they are granted, and if the granted powers are valid, because granted, all other powers not granted, must not be valid." It is also further resolved; [*p*. 45] that "whenever a question arises, concerning the constitutionality of a particular power, the first question is, whether the power be expressed in the constitution? If it be, the question is decided—if it be not expressed, the next inquiry must be, whether it is properly an *incident* to an *express* power, and *necessary to its execution*."

So it was unanimously resolved, by the Supreme court of the state of Pennsylvania, in the case of Commonwealth vs. Cobbet, [*8 Dallas, p*. 407] (a case to be presently more particularly noticed,) that before the constitution of the United States was adopted, the several states had absolute and unlimited sovereignty, within their respective boundaries, and all powers, legislative, executive and judicial, except as they had been granted away, by the articles of confederation, and that they now enjoy all those powers, except such as have been granted to the government of the United States.

It results from this diversity, in the two governments; that, whereas, in a controversy respecting the constitutionality of a state law, it must be shown to be unconstitutional, a law of the general government must be proved to be constitutional; which can only be by showing, that the power to pass it has been granted.

As to the criterion of a power's being granted, or not granted, no resort ought to be had, to the general and extensive words used in the preamble to the constitution. It was resolved by the Virginia legislature in acting upon the report before mentioned, [*Report p*, 44] that "it is contrary to every acknowledged rule of construction, to set up the preamble, in opposition to the plain meaning expressed in the body of the instrument—that a preamble usually contains the general motives or reasons, for the particular regulations or measures, which fol-

low it, and is always understood to be explained or *limited* by them; and that, in the present instance, a contrary interposition would have the inadmissible effect of rendering nugatory, or improper, every part of the constitution which succeeds the preamble." It was further resolved, that the general words in the preamble in question, would the rather be excluded from having that extensive influence, because they were copied into the present constitution, from the eighth of the articles of confederation, [*Report p. 44*] and in that government, owing to the admitted narrowness of its powers, no pretence existed, for saying that they had this extensive effect. Again it was resolved, that this extensive construction would leave the judiciary entirely in the dark, as to the limit which bounded the legislative power, and consequently, without any adequate means of checking undue extensions thereof, as it must be obvious, that all measures, tending to promote the general welfare, &c. " must be questions of mere policy, and expediency, on which, legislative discretion alone, can decide, and from which, the judicial interposition and control, are completely excluded." [*Report p. 13.*]

These principles and authorities equally show, that a power ought not to be considered as granted, because, in the opinions of the judges expounding the constitution, it ought to have been granted. This point, as to them, is entirely *coram non judice*. The people, alone are competent to decide it; and they have decided every power to be withholden, which has not been legitimately granted. Their will is supposed to be in accordance with their expressions; but if this were even otherwise, the answer to the courts would be "*quod voluerunt, non dixerunt.*"

In deciding whether the jurisdiction given to the federal courts by the constitution, is confined to those courts, or is extensive enough to control that of the state courts also, in the case of treaties, the first remark which occurs, is, that it would be difficult to draw the line under the actual provisions of the constitution, between a *total* and partial interference. The first, as well as last, depends upon the discretion of congress, and

yet it can hardly be presumed that the constitution intended that the state authorities, on this subject, should be wholly invaded and set aside, when, in the sixth article thereof, it recognizes the power of the state judges, over treaties, and provides for their being sworn to observe them.

It is next to be observed, that, naturally the jurisdiction granted to a government, is confined to the courts of that government. It does not, naturally, run into and affect the courts of another and distinct government; whether that government operates upon the same, or another tract of country. In relation to another and distinct government, acting upon another territory, the position is undeniably clear; nor is it less so, in the case before us, if the before mentioned ideas relative to the nature and effect of federal republics, in general, and ours, in particular, are correct.

If this principle be true, in general, it will become so, *a fortiori*, if, in all the other parts of the constitution, on the subject of jurisdiction, the federal courts are, alone, contemplated; and if, in all other instances, the federal authorities act directly upon the people, and not through the medium of those of the states. Both of these positions appear to me, to be unquestionably true.

As to the first:—it will be seen, that the first section of the third article of the constitution, relates, solely and exclusively, to the courts of the United States. It provides for their establishment, for their tenure in office, and their salaries. It has no eye to the state tribunals. So in the last clause, of the second section of the third article, providing, that the trial of all crimes shall be by jury, and be held *in the state* in which such crimes shall have been committed, the federal courts are, exclusively, contemplated: it would have been absurd, to have provided, that the courts of a state, which has no jurisdiction beyond its limits, should be held within those limits. This clause, then, of the very section in question in this case, being, undoubtedly, confined to the federal courts, it would clearly follow, in a case of doubt, that the whole section was subject to the same restriction. The same restriction is kept up, in the

amendments subsequently adopted in the constitution. In the eighth amendment, it is provided, that the accused shall have a right to a speedy trial, by a jury *of the state* and district in which the crime shall have been committed; a provision wholly superfluous and absurd, as relative to the state courts. So in the ninth amendment, providing that in cases of the value of twenty dollars, the right of jury trial shall be preserved, it will not be contended, that it relates to the jurisdiction of the state courts; as most of the state constitutions had, already, provided for the inviolability of jury trial, and the state governments always claimed and exercised the power to say under what limitations and restrictions the jury trial shall prevail in their courts. It is also to be borne in mind, that one of the last amendments to the constitution, which declares, that the judicial power of the United States, shall not be construed to extend to suits brought against a state, by citizens of another state, or of a foreign state, is confined to the federal courts, in exclusion of those of the states; for, if the state courts were also inhibited from this jurisdiction, the parties last mentioned would be left without any redress whatever, when aggrieved by a state! If then, in every other part of the constitution, which respects jurisdiction, the federal courts, alone, are contemplated, and if, in an important clause of the very section now in question, the restrictive construction is found to prevail, it would seem a natural consequence, that it should prevail, also, in the remaining part of that section.

If, in addition to these considerations, it be also recollected, that the constitution of the United States, in almost no other instance, acts through the governments of the several states, the probability will be increased, that it did not mean to act through them, or intermeddle with them, in the case in question. The great grievance complained of under the articles of confederation, was, that they acted only through the states, which states palsied the arm of the general government, at their will and pleasure. To remedy this evil, an entire new system was adopted, by which the general government acted directly upon the people. No instances are at present recollected in

which the co-operation of the state governments is necessary, but for the purpose of electing a president and senators. In all other instances the governments are entirely separate and distinct: and every provision of the constitution, will be construed in reference to this feature of the government.

Bearing these principles in mind, let us proceed to inquire into the meaning of the second section of the third article of the constitution, so far as it relates to the case before us. That section is in the following words, viz.—“The judicial power shall *extend* to all cases in law and equity arising under the constitution, the laws of the United States, and treaties made, or which shall be made, under their authority,” &c. That section of the constitution, follows immediately after another section which speaks only of the judicial power of “*the United States*,” and which is thereby declared to be vested in one Supreme court and such inferior courts as congress might ordain and establish. When, therefore, the second section speaks of “the judicial power,” simply, it means the judicial power of the United States, as contra-distinguished from that of the several states, and as vested in the Supreme court, and the inferior courts to be by congress established. It is consistent with every rule of fair construction, to transplant the words “of the United States,” from the first section, into the second, and, thus transplanted, every possible pretence is done away, that the clause just recited any more relates to the judicial power of the several states, than does the clause immediately preceding it, which is *expressly* confined to the judicial power of “*the United States*.” The same inference would result on general principles; for the general words of a constitution, are to be applied to its own institutions, in exclusion of those of another government. This construction, too, by keeping aloof from the state jurisdictions, will keep up and perfect the symmetry between *this* and every other part of the constitution, as I have already attempted to show; and be in perfect unison with the principles that each government contemplates, and only contemplates its own judiciary, and that the operations of the general government are in *this*, as in other cases, distinct from

those of the States, and are neither dependent on, nor intermingled with them.

It is here to be remarked, that the judicial power of the United States is to be determined by the suit or action being proper for the cognizance of their courts, and being actually instituted or brought therein. If brought or instituted in the courts of another government, though they may involve the construction of the constitution, laws or treaties of the United States they form a part of the judicial power of that government, and not of that of the United States. On any other hypothesis, the judicial power of the United States would be co-extensive with the limits of the world, on the principle that the *lex loci* prevails every where, in the case of contracts.

This judicial power is to "extend to" all cases, &c. It is here proper to recollect that the government of the confederation had also a court or courts; but they had only a very narrow or limited jurisdiction, [*Articles of Confederation, art. 9, sec. 2.*] and it was the object of the constitution to extend the jurisdiction of the federal courts, to be then established, beyond that of those which before existed. This word "extend" is fully satisfied, by being confined to the courts of the United States, although the courts of other governments, should also have a jurisdiction over the same subjects. The word according to the best lexicographers, means to widen or enlarge; [*See Johnson's Dictionary.*] it has no sense, which goes to the exclusion of another jurisdiction.—But for the previously limited jurisdiction of the federal courts, and which it was the object of this article to enlarge or "extend" the phraseology would probably have been that the courts of the United States shall "*have jurisdiction in*" all cases, &c. Had this form of expression been used, no doubt could possibly have existed, but that the jurisdiction of the courts of the states, would have been left untouched. So if the amplified and varied form of expression before mentioned had been used, namely; that the judicial power "of the United States," which is vested in one supreme court, and such inferior courts as congress may establish, and which courts shall

have jurisdiction in all cases in law and equity, &c. no scintilla of doubt could possibly have remained, but that the clause would have been confined to the jurisdiction of the federal courts, in exclusion to that of the state courts.

But it is argued, that the power is granted to the supreme court, to control the judgments of the state courts, under the second clause of the second section of the third article of the constitution, which says, that "in all the other cases before mentioned," [two classes being excepted, in which the supreme court is declared to have original jurisdiction,] "the supreme court shall have appellate jurisdiction, both as to law and fact with such exceptions, and under such regulations, as congress shall make." Having endeavoured to show, as above, that the first and third clauses of this section, relate exclusively to the jurisdiction of the federal courts, and do not extend to that of the state courts; having, also, endeavoured to show, that every other part of the original constitution, and its amendments, is subject to the same restriction, it would seem to be a reasonable inference that this last and solitary clause should receive a similar construction. The general principle is, that a constitution settles the powers and arranges the jurisdiction of its own courts, and not those of another government; and although the convention had the power to affect, also, those of the states, this principle will still prevail, unless it clearly and legitimately appears to have been intended to be abandoned. The question then recurs, under the actual provisions of the constitution, was that instrument the settling the jurisdiction of its own courts, or those of a different government?

In order to elude the force of the principle just mentioned, it is contended that the courts of the several states are to be considered, *quoad* this case, as courts of the United States. They are said to be, more emphatically when considered in relation to the courts of the United States, "*parts of one whole;*" (*Federalist, passim*) that is, that they are, *quoad* the case before us, a part of the courts of the United States. They became so, under the provisions of the judicial act, only after

they had given an opinion in a certain way, whereas until they had given such opinion, or in event of their giving it the other way, they remained the courts of the several states! If they are considered as the courts of the several states, then here is the plain case of the judiciary of one government, correcting and reversing the decisions of that of another. If, on the other hand, they are considered as courts of the United States, they become so, *by implication*, and without having been appointed, commissioned or paid by the United States, and without being impeachable by the United States. If the state courts can be thus converted into federal courts, it is evident, too, that congress may effect their independence as state courts; and by throwing on them a mass of federal jurisdiction, bearing no proportion to the salaries they receive from the states, actually drive them out of office!—And whence does this implication arise, in the case in question? From the circumstance of the courts of the states, having, in the course of their ordinary jurisdiction, incidentally acted upon the constitution, laws or treaties of the United States; a circumstance which would equally make the Supreme court of Calcutta, a part of the judicial system of the United States, when enforcing the laws of this country in that. But this is not all—It becomes necessary, and by the like implication, for the courts of the states—even for the Supreme appellate courts of the states, to spread the facts upon the record, without which the courts of the United States cannot act upon the subject. This idea, though essential to the exercise of the appellate power, is utterly at war, both with the character of a supreme state court, as such, and with the right of the states to regulate the proceedings of their own courts. It was resolved by the Virginia legislature, in acting upon the report aforesaid, (*Report, p. 38.*) that the appellate jurisdiction given by the clause in question did not extend to *criminal* cases, depending even in the inferior federal courts, notwithstanding the generality of the terms used, because jury-trial was secured in such cases, by the constitution, and was not a subject of appeal. This argument holds much more forcibly, in the case before us, both because the terms

used are fairly satisfied, by referring them only to the federal tribunals, and because they cannot reach the courts of the states, but by passing into another government, sinking the character of the Supreme courts of the states, into mere inferior tribunals, and invading the heretofore exclusive right of the states, to regulate the proceedings of their own courts.—Again, in order to authorize the re-examination of *facts*, in the Supreme court, a course contrary to the general proceedings of appellate courts, it was found necessary to provide *expressly* for it, in the constitution. Had this not been done, that court would have been confined to the record, as in other cases. This provision is, by analogy, conclusive to show, that the appeals here intended, are only those from the federal courts. Had it been intended to trench upon causes abiding in the state courts, also, the most express and explicit words would have been used, to effectuate so unusual and delicate a power. As such words are not used, it is a fair presumption that this was not intended.

But what is this implication, by which this effect is to be produced? By which a power is to be taken from the state governments, and vested in that of the union, and the courts of the former taken into the service of the latter? There is no iota of expression in the constitution, which either takes it from the states, or gives it to the United States. If it be said, that the implication arises from the nature of the power, I answer that that power, when exercised in a state court, is a part of the judicial power of the states, and not of that of the United States, as I have already endeavoured to show. What then, do the gentlemen contend for, but a power neither expressly granted to the general government, nor taken from the states, nor forming a part of the judicial power of the United States?—If this mode of deducing power be adequate to the purpose, it was very unnecessary, indeed, for the constitution, after having, in the eighth section of the first article thereof, expressively granted to congress, certain important and necessary powers, to go on, in the tenth section, and expressly inhibit them to the states. If in this instance, both a grant of the powers to the United States, and a denial

of them to the several states, were deemed necessary to carry the powers to the general government, what are we to say of a case in which there is neither such grant, nor such denial, to be found in the instrument? If all this caution was deemed necessary, through a becoming respect for the rights of the states, and a just objection to the implication of power, in regard to powers,—those of declaring war, and granting letters of marque and reprisal, for example,—emphatically belonging to the government of the union, and no how appertaining to those of the states, is it not much more necessary, in relation to such as are no how essential to the United States and exclusively belong to the several states, as forming a part of their judicial power? If the convention deemed it necessary, to write with a pen of steel, in relation to the stronger case just mentioned, is it to be believed they would have conveyed, in water-colours, the weaker power now in question?

I have thus endeavoured to show, by the preceding detail, that none of the clauses of the constitution, before mentioned, relate to the state courts, or to the causes therein depending; that the power now in question, has not been expressly granted to the general government, nor inhibited to those of the states; that it exists no where but in the general words of the preamble to the constitution, and is not a necessary incident to any power, which has been specifically granted. It is not necessarily incident to the power of the appellate court of one government, to correct the proceedings of the courts of another, though acting upon the constitution or laws of the former.—I have also endeavoured to show, that the pretence of a constructive power, arising from the general words of the preamble to the constitution, is not only fatal to the principle, that the government of the United States is one of limited and granted powers, and leaves no limit to the discretion of the legislature, but is peculiarly objectionable, as relative to the exercise of the powers of the judiciary.—It is only however, under these general terms of the preamble, and on the ground of an imagination in congress and the fede-

ral judges, that the peace of the union is to be only preserved thereby, that the jurisdiction in question has been assumed. This is not the fact; and if it were, those authorities ought still to have waited until the power had been constitutionally conferred upon them.

An idea was early taken up by congress, founded upon the opinions of some federal writers, (*Federalist, passim.*) that the state judiciaries could not be considered as impartial, in the case of treaties, and would embroil the United States with foreign nations. This disparagement of those authorities, finds no counterpart in the constitution itself.—It is true, that the sixth article thereof, declares, that the constitution, laws, and treaties of the United States, shall be the supreme law, and that the judges of the several states, shall be bound thereby, any thing in the laws or constitution to the contrary notwithstanding. This article merely declares the supremacy of the constitution, laws and treaties of the United States, over those of the several states, but evinces no distrust of the state judges. The only circumstance from which the contrary could, possibly, be inferred, is, the oath imposed on them, by the said article: but that inference is completely demolished, by the considerations, that the oath is a general one, to support the constitution of the United States, and is required to be taken by the federal, as well as the state judges. But if such distrust was any how deducible from this clause of the constitution, the antidote is, also, provided therein: it exists in the oath imposed on them, as aforesaid, to support the constitution of the United States. This is, in that view, if I may so express myself, the agreed remedy for the evil, and, after this, it does not lie in the mouth of any, to raise the objection. It is not for congress to distrust those in whom the constitution has confided; to distrust them, in the exercise of an ancient and ordinary jurisdiction, and which has not been taken away, or impaired by any specific grant in the constitution.—While it is not intended to enter into any comparison, of the fitness of the respective judiciaries for that service, it may be asked, however, is it insinuated or expected, that the federal judges will

yield to *political* consequences, and adapt themselves, in matters of treaty, to the policy of the administration? I hope not: and yet it is difficult to assign any other ground, on which their monopoly of jurisdiction, on this subject, has been so zealously contended for.

If the power now in question belongs to the state tribunals, when attaching therein, in exclusion of the courts of the United States, that fact is well known to foreign nations, and must be submitted to by them. If it could even be deemed an outrage upon them, they must be content to receive the magnanimous answer, given by the queen of England, to the Russian emperor; (1 *Bl. Com.* 256.) namely, that she was not warranted by the laws of England, in doing the arbitrary act which he required.—I presume that the British nation, at least, would not quarrel with us, for following what has ever been deemed a proud example, in her own annals. They would not condemn us, for adjudging the decision of that tribunal to be final, which her subjects, with a choice of jurisdictions before them, *elected* to resort to, and which,—under the actual law of congress on the subject,—is final, if found in their favour.

The power now contended for, is no such mighty boon, in favour of the state judiciaries, as may have been supposed. It is exercised, as I have already remarked, by the courts of every civilized nation.—On the ground of the contract following the person of the debtor, the laws of the country in which it originated, (including treaties and all,) are to be decided on, by foreign tribunals. They, indeed, would wish to conform to the constructions of the courts of the state in which the contract originated; but their decisions, if otherwise, are nevertheless final. Why shall the sovereign states of America, sovereign in respect of all powers not clearly and specifically granted to congress, not possess the rights, claimed and exercised by every other state? Why shall foreign nations require the head of a confederated government, to exercise powers not granted to it by the constitution, and which would embroil it with the members of which the confederacy is composed? Why shall we run this risk, and establish these preferences,

in behalf of the subjects of nations, certainly yielding us no equivalent therefor, and, at most, premitting foreigners to stand on the same footing, in their courts with themselves?

It is here to be observed, that in most of the suits depending in this country, in which foreigners are parties, they will be plaintiffs and not defendants. They will not be defendants, because, in general, they remain in their own countries. As plaintiffs, they have elected their jurisdiction, and there is no hardship, in their being compelled to abide by it: and even in the few cases in which they may be defendants here, this election is also extended to them, by the twelfth section of the judicial act; the constitutionality of which, however, I do not mean to inquire into.—In every instance, therefore, in which a state tribunal passes upon the cause of a foreigner, he has made his election of the state judiciary. But if this were even otherwise as to foreign *defendants* in the state courts, as, in most instances, foreigners will be *plaintiffs* when suing in this country, the rule of construction forcibly applies, that laws are to be expounded in relation to those cases, *quæ frequentius accidunt*.

I have said that this controlling power was not essential, to preserve the peace of the nation.—Without going into other considerations, or authorities, on the subject, it is sufficient to remark, that the American people have decided, that it is no cause of offence to foreign nations, to have their causes decided, and exclusively and finally decided, by the state tribunals. In that amendment to the constitution, by which the jurisdiction of the federal courts is prohibited, in suits brought against the states, by foreign citizens, or subjects, this construction is most undoubted, and has never been complained of. Since the adoption of that amendment, the election of jurisdictions has been entirely taken away, from foreigners, in all suits against the states, and those suits can, now, be only brought in the state courts, in exclusion of every other: and that, too, in cases, in which, from the circumstance of the states themselves being parties, it might, perhaps, be plausibly argued, that the judges of the state courts were not free from bias.—I consider that

this clear declaration by the American people, and which has never excited a murmur in foreign nations, has put down the notion now in question. It has settled the question, forever, that it is no cause of war to foreign nations, that the state judiciaries should finally decide the causes elected to be brought therein, by their subjects. It has, consequently, overthrown the only foundation, on which the whole superstructure of the twenty-fifth section of the judicial act has been supposed to rest.

That pretence is the only one on which the power in question could be attempted to be justified.—That of rendering uniform, all judgments in the case of treaties, is still less tenable, and is even not attained by the actual provisions of the judicial act. Under that act, the appeal equally lies to the Supreme court of the United States, where such uniformity already exists, and is denied where it is wanting. If for example, the Supreme court of the United States has decided against a treaty, and the Supreme court of a state decides the same way, there this uniformity already exists, and yet the appeal is allowed. If on the other hand, the former court decides against a treaty, and the latter in favour of it, this uniformity is wanting, and yet the appeal is denied!

The preceding remarks apply, *a fortiori*, to the limited and partial power of reversal, conferred on the Supreme court, by the twenty-fifth section of the judicial act. It is, indeed, the natural offspring of the parent from which it has proceeded. The novel spectacle of a judgment being final or not, as it may chance to be one side or the other, and of a court being of the last resort or otherwise, as its decision may happen to have been for one or the other of the parties, is worthy of a system, which only admits the judges to be impartial on one side of a given question! That, however, is a chimæra, existing only in the imagination of a former congress. It was an after-thought, well calculated to aggrandize the general government, at the expense of those of the states; to work a consolidation of the confederacy; and can only be pretended to be justified, by the broad principles of construction, which brought the alien and

sedition laws into our code! I would consign it to a common tomb with them, as members of the same family, and originating in the same era of our government.

It was contended, by the appellee's counsel, that the power now in question results to the Supreme court, from the concurrent power given to the state courts over the same subjects. The idea of a concurrence of power, is at war with that of one of the parties possessing a power of reversal and control over the other. It may be further remarked, that this concurrent power is not derived to the state courts, from any grant or concession in the constitution. It results to them, on general principles. It is common to them, with the courts of every other civilized nation, in respect of civil causes—and no argument based merely on this principle, can erect the courts of the states into inferior federal courts, or give the courts of the Union a controlling power over them, which would not, under like circumstances, have a co-extensive effect over those of every other country.

I have already alluded to another objection, to the power granted by the twenty-fifth section of the judicial act, and that is, that it erects the courts of the several states into inferior courts, in a manner not warranted by the constitution.—The inferior courts contemplated by the constitution, must not only be, “ordained and established” by congress, but the judges thereof, must be appointed by the president, and receive an adequate commission, and compensation for their services. Nothing of this sort exists in relation to this court, and yet, *quoad* the case before us, this court is taken into the service of the U. States, and made one of their inferior courts. This is proved, both by the reversal and mandate now before us, and by the emanation of the writ of error. That writ is defined to be, “a commission by which the judges of a superior court, are authorised to examine the record on which a judgment was given in an inferior court, and to affirm or reverse the same.” (2 Bac. 448.) This court, therefore, being called upon to execute the duties of a court, inferior to the Supreme court of the United States, and yet not being constitutionally established as such, ought not to exercise the same.

II. I am now to inquire, *secondly*, whether the case before us comes within the provision of the twenty-fifth section of the judicial act.

That section provides, "that a final judgment or decree, in any suit in the highest court of law or equity of a state, in which a decision in the suit could be had, where is drawn in question, the validity of a treaty, or statute of, or an authority exercised under the United States, and the decision is *against their validity*, or where is drawn in question, the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is *in favour of such their validity*, or where is drawn in question, the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption, specially set up or claimed, by either party, under such clause of the said constitution, treaty, statute or commission, may be re-examined and reversed, or affirmed; in the Supreme court of the United States, upon a writ of error, the citation being signed," &c. But it is further provided, therein, that "*no other error shall be assigned or regarded*, as a ground of reversal, in any such case, as aforesaid, than such as appears on the face of the record, and *immediately respects* the before mentioned questions of *validity or construction*, of the said constitution, treaties, statutes, commissions or authorities in dispute."

While the two first members of this section, are confined to cases, in which the validity of a treaty, &c. is decided against or held to be outweighed by the conflicting authorities of the several states, the third member (taken in exclusion of the proviso) would seem, by its terms to apply to cases, in which the construction of a treaty occurs, and the decision is against the title, &c. set up under the same; although the authority and application of the said treaty, should be expressly admitted, both by the adverse party and the court, and the decision should, in fact, be made upon grounds of a mere ordinary nature. But this construction can never be right—it is not justified, by even

that unwarrantable jealousy of the state courts, which gave rise to the section in question—and would invade, without even a plausible pretext, the jurisdiction of the state courts, upon points of their mere ordinary jurisdiction, in all cases, at least, in which a treaty, &c. should come in question, and the decision was, on any ground, adverse to him who relied upon it. It would give an appeal, although the construction of the treaty, &c. neither came in question, nor was decided against, but was even permitted to operate in the party's favour—who however, on some other and ordinary ground, was estopped from succeeding in the cause. The construction of the act, however, does not depend merely upon the last member of the section. By the exception or proviso therein also contained, no other error is to be assigned, or regarded than such as appears on the face of the record, and *immediately respects* the construction of the treaty relied on. This proviso or exception especially when taken in connexion with a principle which pervades all appellate courts, namely, that a party shall not assign for error, that which is beneficial, or not injurious to him, confines the appeal to cases in which, as it appears from the face of the record, the treaty both came in question, and was decided against, to the injury of him who relied on it. In other words, the exception of the clause, restricts the preceding words of it, which *might* otherwise, have been considered more extensive, and produces a symmetry between all the members of the section.

This view of the subject would produce a correspondent right to the party grieved by the construction of the court below to make the point of the decision upon the treaty, a part of the record, that is of the judgment, as well to give jurisdiction to the appellate court, as to afford a foundation, on which the errors permitted by the act to be assigned, are to be erected. But to suppose that a court having only jurisdiction in a single case, is not to show that that case has actually occurred, would be as novel, in the history of juridical proceedings, as it might be fatal to the ordinary grounds of jurisdiction of the several states—grounds, on no pretence, requiring the corrective power

now contented for, and as to which, the state courts possess the undoubted privilege even to err, without remedy.

In the case before us, while it is admitted that the appellant was a British alien, and set up the treaty of peace, as a ground of defence against the appellee's claim, it was far from being the *only* ground of that defence, or on which, only, the decision of this court, or that of the District court, could have turned.—The case agreed in the cause, consists of fourteen different findings, most of which are of a mere ordinary character. For example, as this suit respected land lying in the territory granted by the English crown, to lord Fairfax, and also granted to the appellant by this commonwealth, since his death, one of those findings drew in question the point, (*possibly* never before solemnly settled by this court,) whether lord Fairfax had an allodial, or only a mere seignorial right to the land. Under the last idea of his title, a judgment in favour of the appellee, ought not, *perhaps*, to have been rendered, although in other respects, the treaty, should have been in his favour. *That* would have been a mere ordinary ground of jurisdiction, no how within the meaning or purview of the twenty-fifth section: and many other points of the same character, may be found to exist in the case agreed.—Whatever the fact may have been, the most the Supreme court of the United States is permitted to know, is to be collected from this court's judgment of reversal; and that judgment is *general*, and only takes the ground, that the law, on the case agreed, is, on some point, in favour of the appellant. It may well have been, for aught, appearing, of record, to the contrary, that the judgment was rendered upon the before mentioned question respecting the nature of lord Fairfax's title; or on some of the other ordinary, grounds of inquiry submitted by the case agreed; or it may be taken to have been rendered—as the fact really was—upon the act of compromise of 1796, which, although it was posterior to, and formed no part of the case agreed, was considered by the court, as a letter addressed to them, by the appellee, authorizing it to render the judgment, pursuant to the provisions of that act. But if, in truth, the judgment of this court *was* ren-

dered upon the construction of the treaty, it is the appellee's misfortune, that he did not manifest it to the appellate court, by spreading it upon record.

Thus stands the case upon the record, by which alone the Supreme court of the United States should have been governed, in assuming a jurisdiction in the case. But if that court had held itself at liberty, to go out of the record, and resort to those reports, which are deemed authentic evidences of the decisions therein contained, its jurisdiction, in this case, would have been cut up by the roots altogether. The report of the case [*— Munf. p. 218.*] would have shown, that if the treaty of peace was at all decided on, by the district court, its decision *thereupon*, was in the appellee's favour, and that that decision was, in effect, affirmed, as to that point, by the equal suffrages of the judges of this court upon it. That report does not merely omit to state, as the record does, whether the treaty was decided upon, or not, by this court, and how: it goes further and shows, that the actual decision of this court was rendered upon another, and ordinary ground of jurisdiction—the act of compromise aforesaid: such a ground, as no error can be assigned on, under the proviso of the judicial act, as aforesaid, and as must for ever bar the Supreme court of the United States from acting upon the case, unless we go beyond the actual provision of the section in question, let in the power of that court, upon grounds of a more ordinary nature, or admit that to be a ground of error, which may have been decided in the party's favour!—I conclude, therefore, that it does not appear from this record, that the Supreme court of the United States had jurisdiction in the case before us, 'under the true construction of the act in question, and that it appears, on the contrary, by authentic evidence, *aliunde*, that they had no such jurisdiction. I cannot consent, therefore, to wave the exercise of the just and constitutional powers of this court, and to register and enforce the judgment before us, even admitting the section in question to be constitutional, until I am prepared to admit that the Supreme court of the United States has a right to review and reverse the judgments of this court, in all cases whatsoever: or

at least in all in which a treaty, &c. may be either really or *colourably* relied on, as *one* of the grounds of defence, or claim, although the same was either not decided upon at all, or the decision was in the parties' favour.

III. I come to inquire, in the third place, whether this court has a right to declare its own opinions, on both or either of the questions before mentioned, if opposed to the decisions of the Supreme court of the United States?—That depends upon the question first discussed; whether an appeal lies from this court to that, or in other words, whether this court be subordinate to that, in relation to the present subject? If it is not, however respectable that court may be, its decisions are not binding upon this tribunal.

In making a decision upon this subject, this court does not so much decide what are the rights and powers of the federal court, as what are its own.—There is no position more clear, than that even in the *same* government, a court may be paramount, as to some powers, while it is subordinate as to others. The general court of this commonwealth, for example, is the Supreme court as to all criminal cases, though its jurisdiction is inferior to that of this court, as to those which are civil. No person will deny, that, in relation to criminal causes, it would adjudge itself to be the court of last resort, and would resist the encroachments of this court upon it. It would resist, and most properly resist, an edict of this court, condemning a citizen to suffer death, whom that court had adjudged to be innocent. Every argument applying to justify the decision of the general court, would hold more forcibly, in the case before us. If such resistance can be made by a court which is, in most instances, an inferior court, much more can it, by one which is in no instance, subordinate. If it can be made, by a court which is, in truth, a part of “one whole,” much more can it, by one which is not. If it can be made by a court of the *same* government, with much propriety can it by that of a different one.

The counsel for the appellee have furnished us with a string of cases, in which the jurisdiction in question has been entertained, by the Supreme court of the United States. They

have had it in their power to do this, because the cases occurred in *that* court, and not in this. The portrait is exhibited *as it is*, because the man, and not the lion, was the painter. (*See Æsop's Fables.*) It is not to be denied, that the jurisdiction now in question has been entertained by the Supreme court, in sundry instances: But that jurisdiction has gained ground by a piece-meal, and has never received the solemn, and deliberate discussion, and decision, of that tribunal. It has been adopted, also, under a latitude of construction, and discretion, in the court, which is at war with the idea of limited and specified powers, in the general government. That decision was coeval, as I have already said, with sundry acts of the national legislature, passed upon the same principle: but while those acts have been scouted, and repealed, by general consent, under a more correct view of the constitution, the decision has been suffered to remain, and to be acted on as a precedent!

I have already said, with the Virginia legislature, (*report, p. 4.*) that the powers of the federal government result from the compact, to which the *states* are parties; are no further valid, than as they are authorized by the grants enumerated in the compact; and, I will now add, by the same authority, "that in case of a deliberate, palpable, and dangerous exercise of powers, not granted by the said compact, the states, who are the parties thereto, have the right, and are in duty bound, to arrest the progress of the evil." (*Report p. 4.*)—While the states in their legislative, or even original character, are authorized to interfere, in cases of the palpable nature just mentioned, the courts of the states are also authorized to check the evil when it occurs, in the exercise of their ordinary jurisdiction.—Thus in the before mentioned case of the commonwealth *vs.* Cobbet (3 *Dall.* 342.) the Supreme court of the state of Pennsylvania, solemnly and unanimously refused to permit the defendant, who was an alien, to remove a cause in which he was sued by the state, in its Supreme court, into the Circuit court of the United States, notwithstanding the comprehensiveness of the words of the twelfth section, of the judicial act, upon this subject.—That court, after declaring, in the most explicit

terms that all powers not granted to the government of the United States, remained with the several states; that the federal government was a league, or treaty, made by the individual states, as one party, and all the states, as another; that when two nations differ, about the construction of a league, or treaty, existing between them, neither has the exclusive right to decide it; and that, if one of the states should differ with the United States, as to the extent of the grant made to them, there is no common umpire between them, but the people, by an amendment to the constitution, went on to declare its own opinion on the subject, and overruled the motion, on the ground that the sovereign state of Pennsylvania could not on account of its dignity, be carried before that court.

One of the appellee's counsel was pleased to call this decision, a *dictum* of chief justice M'Kean's.—I must be excused for saying it is no *dictum*, nor is it the sole and individual opinion, of that respectable judge. It is the solemn and unanimous decision, and resolution, of the Supreme court, of one of the most respectable states in the Union. It contains no principle which every friend to the federative system, of government, will not readily subscribe to: it exhibits no sentiment alarming to any, but to the friends of consolidation.

It has been said, that this decision of the Supreme court of Pennsylvania, is a single and solitary one.—The question has, *perhaps*, seldom occurred in the state tribunals. As, however, error does not become truth, by being often repeated, neither does truth lose any of its beauty, by being seldom promulgated. Again, it has been said, that the jurisdiction of the Supreme court, has been acquiesced in, by some of the states. It has never been before, asserted in the courts of this commonwealth, nor acquiesced in by them. As to the acquiescence of other states, I deem it unnecessary to go into any inquiry, on the subject. While such acquiescence, if it has existed, may be accounted for on so many grounds, other than that of an acknowledgment of the federal claim, it is sufficient for us, to say, that those decisions are not binding upon us. Other states may abandon their own rights under the federal compact, but have no power to cede or relinquish ours.

I consider this decision by the supreme court of Pennsylvania, as a complete and solemn authority, to show, that in case of a difference of opinion between the two governments, as to the extent of the powers vested by the constitution, while neither party is competent to bind the other, the courts of each have power to act upon the subject.

So in the case *Rose vs. Himely*, [4 *Cranch*, 241.] it was resolved by the supreme court of the United States itself, that a sentence rendered by a self-constituted body, or by a body not empowered by its government, to take cognizance of the subject could have no legal effect whatever; that the power under which it acts, must be looked into, and its authority to decide the questions, which it professes to decide, must be considered; and that the operation of every judgment, must depend upon the power of the court to render the judgment, or, in other words, on its jurisdiction over the subject matter, which it has determined.

These authorities are conclusive to justify this court, in pursuing its own opinions on this subject; and I can perceive no arguments justifying the authority of the decisions of the Supreme court of the United States, in relation to this case, which would not equally sustain its judgments, rendered upon the construction of our acts of descents, for example, should that court ever so far forget its own limited powers, as to intrench on that province, also.

Upon the whole I am of opinion, that the constitution confers no power upon the Supreme court of the United States, to meddle with the judgment of this court, in the case before us; that this case does not come within the actual provisions of the twenty-fifth section of the judicial act; that this court is both at liberty, and is bound, to follow its own convictions on the subject, any thing in the decisions, or supposed decisions, of any other court, to the contrary notwithstanding.

My conclusion, consequently, is, that every thing done in this cause, subsequently to the judgment of reversal, by this court, was *coram non judice*, unconstitutional, and void, and should be entirely disregarded by this court; that the writ of

error in this case was improvidently allowed; and that the judgment of reversal by this court, should be now certified to the Superior court which has succeeded the district court of Winchester, in its powers, for the purpose of being carried into complete execution.

Fleming, J. This cause has been justly regarded as one of the first importance, as it involves in it a great national and constitutional question of extreme delicacy; and has therefore been elaborately argued with great ability by some of the most distinguished characters of this bar; and has also received from the court the greatest attention, and the most mature deliberation. It is fortunate and satisfactory to find, that the opinion of the court is *unanimous* on the important occasion, though we have to regret, that, from a peculiar circumstance, one of our enlightened and worthy brethren did not sit in the cause; whose opinion—presuming he would have concurred with the rest of the court—would have added weight to the decision.

The question now to be decided, is not whether this court erred in the case of *Hunter vs. Fairfax*—but, whether, if so, the supreme court of the United States has jurisdiction to correct the error?

It seems unnecessary for me to travel again over the extensive field of discussion that has been so amply and ably explored by the judges who have preceded me, and I shall therefore not enter into abstract reasoning, but be content with briefly noticing a few of the most prominent points in the cause; in doing which, however, a repetition of many of the remarks already made, cannot be well avoided.

I shall inquire, 1st, whether the 25th section of the judicial act of congress, so far as it respects the case before us, is justified by the constitution? and 2d. whether this case is comprehended within the provision of that section?—And, as a preliminary to those inquiries, I shall take the liberty of quoting a few passages in a celebrated book, styled the *Federalist*, which was often cited in the argument of this cause.

The author, a zealous friend of the constitution, avowedly an advocate for its adoption by the states; and written to obviate some objections that had been made respecting its powers, observed in volume 2d, page 26, that if the government be national with regard to the operation of its powers, it changes its aspect when we contemplate it in relation to the *extent* of its powers.—The idea of a national government, (says the book,) involves in it, not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government.—Among a people consolidated into one nation, this supremacy is completely vested in the national legislature.

“ Among communities united for particular purposes, it is vested *partly* in the general, and *partly* in the municipal legislatures—In the former case, all local authorities are subordinate to the supreme and may be controlled, directed, or abolished by it at pleasure.—In the *latter* (the case of our own government)—the local or municipal authorities form distinct and *independent* portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere.—In this relation then, the proposed government cannot be deemed a national one, since its jurisdiction extends to certain enumerated objects *only*; and leaves to the several states a residuary and inviolable sovereignty over all other objects.”

The legislatures of the several states, not satisfied that the above just principles would always govern in the construction of or expounding the constitution of the United States, obtained an amendment thereto, *explicitly* declaring that “ The *powers* not delegated to the United States, by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

Let us now apply those *inestimable* principles to the case under consideration, and inquire whether the 25th section of the judicial act of congress, so far as it respects the case before us, is justified by the constitution? By the third article of which, section the first—“ The judicial power of the United States

shall be vested in one Supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish (not naming nor squinting at, the state courts).—Section the 2d—in the judicial *powers* of the courts, the jurisdiction seems to be exclusively confined to those to be ordained and established by congress—A second paragraph of the same section says—“That in all cases affecting ambassadors and other public officers, consuls, &c. the Supreme court shall have *original* jurisdiction.—In all other cases before mentioned the Supreme court shall have appellate jurisdiction, both as to law and fact; with such exceptions, and under such regulations, as the congress shall make”——which exceptions and regulations must, I conceive, relate to such inferior courts as, by the first section of the article, congress may, from time to time, ordain and establish, and cannot in my apprehension, by fair construction, have relation to the *state court*; there having been no power delegated to congress, to interfere, or meddle with them; and which do not appear by any expression in the instrument, to have been in the contemplation of the framers of the constitution:—for if they had been so, and the state courts were intended to have been subject to the appellate jurisdiction of the Supreme court of the United States, a short sentence, or a very few words, would have put the matter out of all doubt:—and I cannot presume that,—when the collected wisdom of the several states was convened, and, for many weeks, deliberated on a proper system of jurisprudence, for the government of the union,—so important a matter, had the state courts been in contemplation, could have escaped the notice of them all; and have been left to uncertainty and conjecture!

It appears to me then, that the 25th section of the judicial act of congress, not being made in pursuance of the constitution, so far as it respects the case before us, was not justified by the constitution. But admitting for a moment, that I may be mistaken on this point, I proceed to inquire,

II. Secondly, whether this case is comprised within the provision of that section? The enacting words of the section are, “that a final judgment in any suit in the highest court of law

or equity of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under the United States, *and the decision is against their validity*; may be re-examined, and reversed or affirmed in the Supreme court of the United States, upon a writ of error, &c. But no other error shall be assigned or regarded, as a ground of reversal, in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity, or construction of the said constitution, treaties, statutes, commissions or authorities in dispute." The only article enumerated in the above recited clauses brought in question in the case of *Hunter vs. Fairfax*, on which the mandate under consideration was founded, was the validity of the treaty between the United States and Great Britain, in the year 1783—and does it appear on the face of the record that the decision was against its validity?—In my apprehension it does not so appear; for the very reverse was the fact: and if that cause had depended altogether on the *validity of the treaty*, the judgment, on the appeal to this court, would have been in affirmance of that of the court below, in favour of Fairfax, or rather, of his heir Philip Martin, the appellee.

It is worthy of remark, too, that when Denny Fairfax was impleaded by Hunter in the district court of Winchester, he had an election to remove the cause into the nearest circuit court of the United States; of which privilege he did not think proper to avail himself, but chose to rest his cause with the state courts.

It appears to me, first, that the 25th section of the judicial act of congress, so far as it respects the case before us, is *not* justified by the constitution:—and secondly, that this case is not comprised within the provision of that section.—I am of opinion, therefore, upon both points, that it is inexpedient for this court to obey the mandate under consideration.—And that is the unanimous opinion of the court.

Nota.—This case was argued in the Supreme court of appeals on Thursday, 31st March, and on the first five days in April, 1814; and the decision was pronounced in December, 1815. .

At the next term of the Supreme court, United States, a writ of error founded on this judgment was argued. The court asserted the constitutionality of the 25th section of the judicial act in its fullest extent, that this case came within its provisions, and was therefore a fit subject for their jurisdiction. In consequence of the disobedience of the court of appeals to the mandate which had been issued before, they proceeded, in the exercise of the discretionary power allowed by the act *L. c.* to a final decision of the cause, and award of execution. They decided that when the validity or construction of a treaty of the United States is drawn in question, and the decision is against its validity, or the title specially set up by either party, under the treaty, this court has jurisdiction to ascertain the title and determine its legal validity, and is not confined to the abstract construction of the treaty itself. It was also determined that the return of a copy of the record under the fiat of the court, certified by the clerk, and annexed to the writ of error, is a sufficient return in such a case; and further, that it need not appear that the judge who granted the writ of error did take a bond upon issuing the citation, as required by the 22d section of the judiciary act. That provision is merely directory to the judge, and the presumption of law is, until the contrary appears, that every judge who signs a citation has obeyed the injunctions of the act. 1 *Wheat.* 305.

AUTHORS OF THE FEDERALIST.

THE *Federalist* having been frequently quoted in this journal, it is deemed proper to copy the following bibliographical information from a literary miscellany.

“MR. OLDSCHOOL,

“The executors of the last will of general Hamilton have deposited in the public library of New York a copy of

"*The Federalist*," which belonged to the general in his lifetime, in which he has designated, in his own hand-writing, the parts of that celebrated work written by himself, as well as those contributed by Mr. Jay and Mr. Madison. As it may not be uninteresting to many of your readers, I shall subjoin a copy of the general's *memorandum* for publication."

' Nos. 2, 3, 4, 5, 54, Mr. Jay.

Nos. 10, 14, 37, to 48 inclusive, Mr. Madison.

Nos. 18, 19, 20, Mr. Hamilton, and Mr. Madison jointly—all the rest by Mr. Hamilton.'

Peri Folio.

DELAWARE—S. C. SUSSEX, 1793.

COLLINS, v. HALL.

A negro cannot be a witness in any case where the parties are whites.

UPON the trial of this cause after several witnesses had been examined upon the part of the plaintiff, one Levin Thompson, was offered as a witness upon the same side. Bayard—for the defendant, objected that the witness being a negro, was rendered incompetent by the act of assembly, passed 3d February, 1787, the 8th sect. of which enacts "That no slave manumitted agreeably to the laws of this state, or made free in consequence of this act, or the issue of any such slave, shall be entitled to the privilege of voting at elections, or of being elected, or appointed to any office of trust or profit, or to give evidence against any white person, or to enjoy any other rights of a freeman, other than hold property, and to obtain redress in law and equity for any injury to his or her person, or property."

It was hereupon proved, upon the part of the plaintiff, that Thompson was a freeman, that his mother and grand-mother had been free, and that they had lived and that he came from the state of Maryland.

The counsel for the defendant contended that the witness was still incompetent. He said that slavery being permitted by the

THE MANNER OF EXECUTING DEEDS AND OTHER INSTRUMENTS OF WRITING IN PENNSYLVANIA.

The chief justice and judges of the Supreme court, the president and associate judges of the court of Common Pleas, and the mayor and recorder of the city of Philadelphia, have power to take the acknowledgment, or probate of deeds, &c. for lands in any part of the state.

The aldermen of the city of Philadelphia, have power to take the acknowledgment and probate of deeds, &c. for lands lying within the city or county of Philadelphia.

The justices of the peace of the several counties, have power to take the acknowledgment, &c. of deeds for land lying within their respective counties.

If the wife of a grantor is a party, the judge or justice, &c. taking the acknowledgment, must examine her separate and apart from her husband, and shall read or otherwise make known to her the full contents of the deed, and on such separate examination, she is required to declare that she did voluntarily of her own free will and accord, seal and as her act and deed, deliver the same, all which must be certified under the hand and seal of the officer.

Two witnesses are usually required to subscribe their names to the execution, and delivery of every deed.

In all cases it is advisable that the grantor should acknowledge the deed, but if he be dead or cannot appear, it may be proved by the oath or affirmation of one or more of the witnesses, who were present at the execution thereof.

If the grantor and witnesses are dead, the hand writing of the latter may be proved by oath or affirmation, but when that proof cannot be had, then the hand writing of the grantor may be proved in like manner.

Deeds made out of the state, may be acknowledged by the grantors, or proved by one or more of the witnesses thereto, before any mayor, chief magistrate, or officer of the city, town, or place where executed, *and certified under the common or public seal of such city, town, or place*, the officer taking care to certify the private examination of the wife as aforesaid.

Bonds, specialties, letters of attorney, and other instruments of writing, require two or more witnesses, and if executed out of the state, must be proved by them before any mayor, chief magistrate, or officer of the city, town, or place where executed, *and certified under the common or public seal of the said city, &c.*

Letters of attorney for the sale of lands or other estates must expressly give power to sell and convey, in fee simple or otherwise, according to the nature of the estate intended to be conveyed, and may be acknowledged or proved out of the state, and certified as aforesaid, or acknowledged by the constituent or proved by one of the witnesses, before a judge or justice of this state.

Sale of lands, &c. under power of attorney, must be made while the power is in force, and such power shall be accounted in force until the agent has notice of countermand, revocation or death of the constituent.

If the wife is a party to the power of attorney, she must acknowledge it in the same manner as a deed.

Assignment of bonds, and specialties, must be under hand and seal, and before two or more credible witnesses, who are required to subscribe their names as such.

**THE
AMERICAN LAW JOURNAL.**

ROYAL EDICT, OR CEDULA,

OF THE 31ST OF MAY, 1789,

*For the Good Government and Protection of Slaves in the
Spanish Colonies.*

COMMUNICATED BY JAMES WORKMAN, ESQ.

IN the Laws of the Partidas, and the other codes of these kingdoms; in the compilation of the laws of the Indies, and in the general ordinances and particular orders communicated to my dominions in America since its discovery, the system of making slaves useful has been established, observed, and constantly followed, and every thing expedient provided for their instruction, treatment and employment, conformably to the principles and rules of religion, humanity and the welfare of the state: nevertheless, as it is not easy for all my subjects in America, who possess slaves, to be sufficiently instructed in all the dispositions of those various laws; and forasmuch as some abuses have been introduced by the owners and managers of slaves,—therefore, in order to remedy those abuses, I have resolved that the following instructions shall be observed, until the promulgation of the new code.

CHAPTER I.

Of the Instruction of Slaves.

EVERY one who possesses slaves, of whatever class or condition he may be, shall instruct, or cause them to be instructed, in the principles of the catholic religion, in order that they may be baptized within the first year of their residence in my dominions; taking care to explain to them the christian doctrine every holyday, on which they shall not be obliged, or even permitted to work, either for their masters or for themselves, excepting at the time of collecting the crop. On those days, their owners shall be at the expense of maintaining priests to say mass, and administer the holy sacraments to them; and on every week day, as soon as their work is finished, they shall say the rosary in the presence of the master or his manager, with the greatest humility and devotion.

CHAPTER II.

Of the Food and Clothing of Slaves.

MASTERS of slaves are bound to feed and clothe them, as likewise their wives and children, whether these be of the same condition or free, until they can earn their own subsistence, which it is presumed the females can do at the age of twelve, and the males at that of fourteen: but not being able to give any fixed rule with respect to the quantity and quality of the food and clothing which are to be given them, —on account of the difference of climates, constitution, and other particular causes;—it is ordered, that the judges of the districts in which the estates are situated, with the approbation of the municipal council and the procurator syndic, as the official protector of the slaves, shall determine the quantity and quality of the food and clothing which are to be given to them, according to their ages and sexes; to the

custom of the place; and to what are commonly given there to free labourers. And the determination so made, after having been approved of by the royal audience of the district, shall be affixed upon the doors of the town-house, and the churches; and on those of the oratorios or hermitages of the estates, in order that it may come to the knowledge of all.

CHAPTER III.

Of the Occupations of Slaves.

THE principal occupation of slaves must be agriculture, and not those employments which require a sedentary life; and in order that their masters and the state may be benefitted by their work, and that they may perform it duly, the judges shall regulate, in the manner and form directed in the preceding chapter, their daily tasks and labour, according to their respective ages and strength. They shall begin their work at sun-rise, and leave off at sun-set; being allowed in the intermediate time two hours each day for themselves. Slaves above the age of sixty, or under the age of seventeen, years shall not be obliged to do *task-work*; nor shall female slaves be employed in any work unsuitable to their sex, or to work along with the males.

CHAPTER IV.

Of the Diversions of Slaves.

ON all the principal holydays, after the slaves have heard mass, and had the christian doctrine explained to them, their masters or managers shall allow them to divert themselves innocently in their presence; but they shall not allow them to be along with the slaves of other estates, nor shall the slaves of the different sexes be permitted to be together. They shall be prevented from excess in drinking; and their diversions must be ended before the hour of evening prayer.

CHAPTER V.

Of the Dwelling Houses and Hospitals for Slaves.

ALL masters of slaves must furnish them with houses, those of the men being distinct from those of the women, if they are not married. These houses must be commodious and sufficient to defend the slaves from the inclemencies of the weather; and they must be supplied with high beds, blankets, or necessary linen. Each slave shall have his own bed, and there shall be no more than two beds in a room. A building separated from the rest, which must be warm and commodious, shall be destined for the sick, who shall be assisted with every thing necessary. But if their owners prefer sending them to the public hospital, they shall contribute for their daily support there such a sum as shall be determined by the judges, in the manner and form mentioned in the second chapter. And if any of the said slaves die, their owners shall be charged with the expenses of their burial.

CHAPTER VI.

Of Old and Infirm Slaves.

SLAVES who, on account of old age, or illness, are unable to work, and likewise children of both sexes, must be maintained by their owners; who shall not emancipate them, in order to get rid of them,—except on condition of giving them sufficient means of support, to be approved of by the judges and the procurator and syndics.

CHAPTER VII. •

Of the Marriages of Slaves.

THE owners of slaves shall prohibit illicit intercourse between those of the two sexes, and encourage their marriage; not hindering their own slaves from intermarrying with

those of others. In this last case, if the estates of the different proprietors are so far distant from one another, that the consorts cannot fulfil the purpose of marriage, the wife shall follow her husband, whose owner may purchase her at a fair valuation, to be made by two skilful appraisers, of whom one shall be chosen by each party; and in case of disagreement, a third appraiser shall be appointed by the authority of justice. If the owner of the husband does not agree to the purchase, the owner of the wife may purchase the husband, at a valuation to be made in the manner above mentioned.

CHAPTER VIII.

Of the Correction of Slaves.

As the owners of slaves are obliged to maintain and educate them, and to employ them in useful works proportioned to their strength, age and sex, without forsaking their children or those who are old and sickly; there results a corresponding obligation on the part of the slaves to obey and respect their owners and managers, to perform the tasks and works allotted to them, according to their strength, and to venerate their masters as their parents: and every slave who shall fail in performing any of those obligations, ought to be and may be corrected by the master, or manager of such slave, according to the nature of the neglect or offence, by imprisonment, by being put in the stocks or in irons, or by whipping, not exceeding twenty-five lashes, to be inflicted with some mild instrument of chastisement, in such a manner as not to cause any severe contusion, or the effusion of blood. And none but the masters or overseers of slaves shall be authorized to chastise them.

CHAPTER IX.

Proceedings against slaves in criminal cases.

WHEN any slave shall commit a crime requiring a greater punishment than any of those mentioned in the preceding

chapter, the master, his manager, or any other person present at the commission of the crime, shall secure the offender: And thereupon information shall be duly laid before the competent judge, who having heard the master of the slave, (unless he shall abandon him to justice before contestation of suit) and the procurator syndic, in his quality of protector of slaves, shall proceed according to law in the trial, condemnation, and punishment of such slave, in the same manner as the laws prescribe in the case of criminals of free condition.

When the owner of the accused slave shall not abandon him to justice, and the latter shall be condemned to the payment of damages in favour of a third person, the master shall be answerable for the full amount of those damages, independent of the corporal punishment which the offending slave may suffer according to the nature of his offence.—And if such punishment extend to life or mutilation, it must be approved of by the royal audience before it is inflicted.

CHAPTER X.

Penalties imposed on those who maltreat their slaves.

EVERY owner, master, or manager of slaves, who shall neglect to do what is prescribed in the preceding chapters, with respect to the instruction, aliments, clothing, diversions, dwellings or hospitals of slaves, or who shall abandon their aged, infirm, or young slaves, shall be fined fifty dollars for the first offence, one hundred dollars for the second, and two hundred dollars for the third; and the said fines shall be paid by the master, even when the offence shall have been committed by his manager only; if the latter be not able to pay the same. The amount of these fines shall be distributed in three equal parts; one to the informer, one to the judge, and one to the fund of fines, which will be treated of hereafter. In case those fines should not produce the desired effect, heavier penalties shall be inflicted upon the offenders, as disobedient to my royal mandates. And let information, with proof of the facts, be given to me, that I may take measures

accordingly.—When the masters or managers of slaves shall be guilty of punishing them to excess, so as to occasion grievous contusions, the effusion of blood, or mutilation of members, besides paying the above-mentioned fines, the offenders shall be prosecuted criminally, and punished according to the nature of the crime, in the same manner as if the injured person were free. And if the injured slave be able to work, he shall be confiscated and sold to another master; the price to be appropriated to the fund of fines. But if the slave cannot be sold, on account of being unable to work, he shall not be restored to his master, but the latter shall be obliged to allow him a daily sum, which shall be appointed by judicial authority, for his maintenance during the remainder of his life: and the said allowance shall be paid every three months in advance.

CHAPTER XI.

Proceedings against those who injure the slaves of others.

NONE but the masters or managers of slaves have authority to chastise them. If any other person shall abuse, chastise, wound, or kill any slave, the offender shall be liable to the punishments ordained by law against those who commit the like misdemeanors or crimes against free persons. The master of the injured slave shall prosecute the offender: or if he fail to do so, the prosecution shall be conducted by the procurator syndic in his quality of protector of slaves. The said protector shall also intervene in the cause in the former case, although there be another prosecutor.

CHAPTER XII.

Of the Lists of Slaves.

THE owners and masters of slaves shall be obliged to deliver annually to the justices of the city or town, in whose jurisdiction their plantations may be situated, lists, signed and sworn to by them, of all the slaves they have in those

plantations, distinguishing the said slaves by their sexes and ages, in order that the notary of the municipal body may take account of them in a particular book, which shall be kept for that purpose, together with the lists aforesaid. And whenever any slave shall die, or be absent from the plantation, the master must give notice thereof to the judicial authority, within the term of three days, that it may be noted down in the said book; in order that all suspicion of the slave having been put to death by violence may be avoided. If the master fail in doing what is above required, he shall be obliged to prove fully either the absence or the natural death of the slave: or on default thereof, the procurator syndic shall institute a prosecution against him.

CHAPTER XIII.

Means of inquiring into the conduct of masters towards their slaves.

THE distance of many plantations from the towns, the inconvenience which would result from permitting slaves to go from their plantations without an order from their masters or overseers, under the pretext of making complaints, and the just regulations of the law, which ordains that no fugitive slave shall be assisted, protected, or concealed; require that means be provided,—conformably to all those circumstances, whereby it may be known how the said slaves are treated. One of those means is, that the priests, who go to the plantations to explain the Christian doctrine, and say mass to the slaves, shall obtain information from them how they are treated by their masters and overseers, and how the provisions of this instruction are observed: of all which the said priests shall give secret notice to the procurator syndics, in order that they may institute the necessary inquiries to ascertain whether the masters or their managers fail, in the whole or in part of their respective obligations. The priests, who shall give such secret notices or denunciations, shall not be in any wise answerable therefor,

whether they be well or ill-founded: for these notices will only serve to empower the procurator syndic to require the competent judge to appoint a member of the municipal council, or some other person of approved character to investigate the affair, and to form the first summary proceeding thereon. The minutes of this proceeding shall be delivered to the said judge, who shall continue and determine the cause according to law. Besides those means, it will be expedient that one or more persons of good character and conduct be appointed by the judges, with the consent of the municipal bodies, to visit the plantations three times a year, and to inform themselves whether every thing prescribed by this instruction be observed. The said visitors shall give due notice of what they observe to the competent judges, who shall proceed thereon, according to law, as circumstances may require. And it is hereby declared that the popular action of denunciation is given against all those who shall fail in performing any thing directed in the preceding chapters; the name of the informer being always kept secret. And the informer shall receive his allotted portion of the fines, without being responsible, except in cases where it shall be most fully proven that the denunciation is false and calumnious. And lastly, it is likewise declared, that the judges and procurator syndics, as the official protectors of slaves, will be held responsible for all their faults of omission or commission, in not taking the necessary means whereby my royal intentions, explained in this instruction, might have their due effect.

CHAPTER XIV.

Appropriation of Fines.

In the cities and towns to which the preceding regulations are applicable, and whose tribunals and municipal councils are composed of Spaniards, there shall be provided and kept at the Town-Hall, a chest having three keys, one of which shall be delivered to the alcalde of the first election,

tion. Presumptions will ever exist in favour of the law, for it will not readily be supposed that any state legislature, who are as much bound by the constitution, and are under the same solemn sanctions as the judges of those courts, to regard it, have either mistaken its meaning, or knowingly transcended their own powers. If, then, by any fair and reasonable interpretation, where the case is at all doubtful, the law can be reconciled with the constitution it ought to be done, and a contrary course pursued only, where the incompatibility is so great as to render it extremely difficult to give the latter effect, without violating some provision of the former.

The plaintiffs' counsel in support of the verdict, say, that the discharge which was given in evidence can be no bar to the action. They contend,

1st. That the statute of New-York, under which it was obtained, is a bankrupt law, and as such, is void for its repugnancy to the constitution of the United States; and this position is supported by the broad assertion that every law which discharges the person and property, as well future, as in possession of the debtor, is a bankrupt law. But to this definition the court does not assent, for this would be to confound at once almost all the distinctions between these laws, which have been known and recognized in England, from which country we borrow the term; from the first introduction of the system there, in the reign of Henry VIII, down to the present time: distinctions which must have been familiar to many of the members of the convention that made the constitution. It is not because these laws may, in some respects, produce the same effects, that they are not to be distinguished from each other. In England the bankrupt system has been confined exclusively to traders, and the creditors of traders; whereas the insolvent laws of this country embrace every class of debtors. It is of no importance whether the debt has been contracted in the way of trade or not, for a person to come within the purview of an insolvent law. So exclusively have bankrupt laws operated on traders, that it

may well be doubted, whether an act of congress subjecting to such a law every description of persons within the United States, would comport with the spirit of the powers vested in them in relation to this subject. But it is not only in the persons, who are the objects of these laws, that a difference exists, but their general and most important provisions are essentially dissimilar. Under a bankrupt law, the debtor is at once, by operation of law, as soon as he has committed an act of bankruptcy, divested of all his property, which is transferred to assignees in trust for his creditors. All dispositions by the bankrupt himself after this are void—an insolvent, on the contrary, retains the management of his own estate, however he may misbehave towards his creditors at large, and it is rarely, unless on his own application, vested in others. It is of no importance how many acts he may commit, which, under a bankrupt system, would enable his creditors to take from him the control of his property, they can seldom act upon him compulsively under the provisions of an insolvent law, if he be obstinate or dishonest, until he has given what preferences he thinks proper, and is become so poor as to be scarcely worth pursuing. Under the one system the creditors are actors, and under the other the debtor himself originates the proceedings; and if, as is sometimes the case, his creditors may do it, even then his consent is generally indispensable under the provisions of an insolvent system. Other differences, in almost every stage of proceeding, might easily be pointed out, but they are so familiar to the profession, that a bare inspection of the act under which this discharge was obtained, will leave no doubt on the mind of any one to which class it belongs. The title proclaims it to be “an act for the benefit of insolvent debtors, and their creditors.” The first section gives power to the *insolvent himself* who is imprisoned on any civil process issuing under the authority of this state, to present his petition to a proper officer, praying that his estate may be assigned and he discharged from his debts. The residue of the act is principally made up of

directions as to the proceedings which are to be observed after the presenting of such petition, until the final discharge of the debtor, all of which differ greatly from the proceedings which take place on the issuing of a commission of bankruptcy. The fourth section declares that such "discharge shall extend to all debts due from him at the time of the assignment, or contracted for before that time, though payable afterwards." If this be not an insolvent law, the court is at a loss to say to what act this appellation can apply.

The opinion which has been expressed on this point would seem to preclude the necessity of inquiring how far this law interferes with the authority given to congress to "establish uniform laws on the subject of bankruptcies"—but as the view which has been taken of the act of this state may be thought incorrect, the court has no objection to consider it, as though it were a bankrupt law.

The power to pass laws of this character, it is said, is exclusively vested in congress, and whether they exercise it or not, no state can have a bankrupt law of its own. As a consolidation of the different states into one national sovereignty was neither effected, nor intended to be effected by the constitution, it has always been conceded that the state governments, retained so much of the power, which they before had, as was not by that instrument exclusively delegated to the United States. It is now indeed one of the amendments to the constitution, that the powers not granted to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people. It is agreed that such exclusive alienation of state sovereignty can only exist in three cases—where, by its terms, it is so—or where a power is conferred on the federal government, and the states are prohibited from exercising a similar authority—or where an authority is granted to the former, to which the exercise of a like power on the part of the different states would be absolutely and totally contradictory and repugnant. It is not pretended that the grant of the power

under consideration is exclusive in its terms—or that there is an express prohibition on the states from exercising a like authority—but it is supposed that such exercise would be so totally inconsistent with the one granted to the government of the union, as to be necessarily comprehended in the third class of *exclusive* delegation. If it be really so, that the passing of a bankrupt law by a state, to operate, as it necessarily must, within its own limits, be absolutely incompatible with the power vested in congress, it would be conceded at once, that such an act would amount to a violation of the constitution of the United States and be void. Let us see whether the counsel have succeeded in establishing this position.

It must be allowed by all, that at the time of making the constitution, each state had a right to pass insolvent and bankrupt laws. As it was desirable, in a country so extensive as the United States, and every part of which was more or less commercial, that the laws relating to bankrupts should be uniform, so also it was an object of great importance that none of the larger commercial states should at any time be without some code on this subject. A system of the first kind, that is one which should be *uniform* throughout the union, could not well be brought about but by delegating the power of rendering it so to congress. Great difficulties however, would lay in the way of a statute, whose provisions should pervade the United States; and as these must have been foreseen, the states might be willing and desirous of retaining the right of passing laws of this nature, until congress could agree on a general plan. Nor can the court perceive any contradiction, absurdity, or repugnance in these several powers existing at the same time in the general and in the state governments—in such subordination, however, that the exercise of the authority vested in the former should for the time, suspend all exercise of the power which resided in the latter, and operate as a repeal of any laws which might have been previously passed by the several states. It is an

uniform rule which congress are to prescribe. But if they furnish none, how is it an interference for each state to legislate for itself? Neither the terms nor spirit of the instrument are thus disturbed. It seems designedly to have been left optional with the general government to exercise this power, that if the embarrassments which lay in their way were insurmountable or very great, they might omit to do it, and thus leave the states to take care of themselves. If it had been intended immediately to divest the states of all power on this subject, and to compel congress to act, the terms of the article would have been much more imperative than we find them, and probably it would have been accompanied with a prohibition on the states. No writer on this part of the constitution has gone farther than to say that the power of naturalization is exclusive—because if congress have a right to ordain a general rule, the states can have no right to prescribe a distinct rule. This construction is supposed to follow, not from any inconsistency there would be in each state passing a naturalization act for itself, if congress did not bring into action the power delegated to them, but from the inconvenience to which it might subject some of the states, by imposing upon them as citizens, obnoxious foreigners, who might become naturalized in another state, without any previous residence, or without any regard to character, by the mere formality of taking an oath of allegiance.

If the argument *ab inconvenienti* applies to the case of naturalization, it has no bearing on that of bankruptcy; for in this case, each state would be legislating principally for its own citizens, and other states could not be injured by any system it might adopt. But this construction, even in the case of naturalization, where the argument in favour of an exclusive power is much stronger than in that of bankruptcy, has not only been strongly controverted, but is opposed by a judicial decision entitled to no little respect. It is the case of *Collet* and *Collet* in the circuit court of Pennsylvania, in which the three judges, one of whom had been a

member of the federal convention, decided, after solemn argument, that the several states still enjoy a concurrent right with congress on this subject, "which however cannot, they say, be so exercised so as to contravene any rule which congress in their wisdom may establish."—The most strenuous advocates for the exclusive exercise of every unqualified power granted to the general government, seem not unwilling to admit the several states to a participation of such power, if it can be exerted consistently with, or without derogating from the express grant to congress. It has not been shown how a bankrupt act, passed by a particular state, can interfere with the exercise of a power residing elsewhere, to promulgate a uniform law for all the states. If similar powers had been granted to the government of the union, respecting the descent of real estates, the recording of deeds, or the celebration of marriages—will it be said that the several states must have remained without any laws to govern the transmission of landed property, or that no deed could be acknowledged or recorded, nor a valid marriage solemnized, although congress might for years omit to prescribe rules on these subjects? The object of this grant could have been no other than to place somewhere a power to correct the mischiefs which might arise from the different states passing on the same subject, not only dissimilar laws, but such as might be unequal in their operation on the citizens of other states. This end of the grant will be sufficiently and effectually attained, if, when the evil arises, congress bring into action the authority vested in them. From them only can a uniform system emanate, but systems, greatly varying it is true, all of which, however, may be salutary, may be established without any derogation from or interference with a right residing elsewhere to introduce *uniformity* on the same subject. Nay, from these very provisions, however discordant, might be selected materials for the one which it was committed to the general government to form. Neither can the passing of such laws by the states be regarded as a resumption of power by them, in which case, it is said, they should produce an express grant

of it. This argument proceeds on the presumption of a previous relinquishment on the part of the states of all right to interfere in this matter, and is thus taking for granted what is the whole question in controversy; for unless such transfer has been made, which is not admitted, no re-assignment of it by the general government can be necessary. No court of the United States will be suspected of feeling any disposition to countenance encroachments by the state legislature on the legitimate authority of the government of the union: but in cases of doubt, and where the limits of separation are not very distinctly marked, and especially where the powers exercised leave in full force and unimpaired those given to the general government, the tranquillity and harmony of the union, will be better preserved by allowing to the states a reasonable share of legislation on the subject in dispute, than by strenuously insisting on a total exclusion. Congress themselves must have entertained an opinion that the different states have this right in the present case; for on no other principle can we account for their leaving the United States so long without a uniform system of bankruptcy. Great and pressing as the call for such a system has been, the obstacles in the way of one that shall be uniform, and in that shape agreeable to all the states, continue to be so numerous, that but little hope is now indulged that any will be soon adopted, but great and serious as these difficulties may be, it would almost be the duty of congress to disregard them, if there existed nowhere else a power to correct the mischiefs which must necessarily be felt in many of the states from the *non-user* of this authority. The inference which has been drawn at the bar from this silence or inaction of congress does not appear correct. It is considered as equivalent to an expression on their part of their sense against the wisdom and policy of *all* bankrupt laws, and that none ought to exist anywhere. Keeping in view the power which congress have, on this subject, it is more natural to interpret such silence into a declaration of their opinion of the inexpediency at present of *any uniform system*, and that the several states still retain

the power which has been contended for, and can therefore take care of themselves. This would not be so great an imputation on their wisdom, as to suppose they can entertain an opinion in opposition to the sense of the whole world, that in a commercial state, such laws are mischievous or unnecessary. The opinion of the court therefore, is, that this law, if a bankrupt law, would not on that account be void.

Another constitutional objection is made to the defence which is set up in this cause. The law under which this discharge was obtained, having passed subsequent to the date of the notes on which the action is brought, is supposed to "impair the obligation of contracts," and therefore to be void, either in the whole, or so far as it may extend to debts incurred previous to the passage of it.

There is not perhaps in the constitution any article of more ambiguous import, or which has occasioned, and will continue to occasion more discussion and disagreement, than the one under which the present difficulty arises, or the application of which to the cases which occur, will be attended with more perplexity and embarrassment. Laws may be passed which so palpably trespass on this article, as to leave no doubt on the mind of any man; others again will be of so questionable a character as to render it not very easy to form a satisfactory opinion concerning them. All the other restraints on the separate members of the confederacy contained in this section of the constitution are conceived in terms so clear and intelligible, that rarely will any hesitation exist as to what will amount to violations of them; but to decide whether a law impairs the obligation of a contract will generally be a task of some intricacy, and it will not be surprising if, in the discharge of it, great diversity of opinion should arise. This has been treated as a very plain case by both parties. By the plaintiffs we are told that it is the clearest case of a law impairing the obligation of contracts that can well be imagined—while the defendant contends that it is quite as certain that insolvent laws were never intended to be embraced by this provision of the constitution. The lat-

ter is the opinion of the court; but instead of regarding it, with the defendant's counsel, as a question of little or no difficulty, the court has not come to this conclusion, but, after much hesitation, owing not only to its intrinsic difficulty, but because it is well known that the most respectable opinions to the contrary have been expressed elsewhere: the court will proceed to assign its reasons for the judgment which it has formed.

To arrive at the true meaning of any article of doubtful import in the constitution, a better mode cannot be adopted than the course which is generally pursued for the interpretation and understanding of ordinary remedial statutes: that is, to recur to the situation and history of the country at the time; to its contemporaneous exposition, if it has received any; and to the general understanding of the community, especially if such understanding shall have been long acquiesced in by all the states and all the courts of the union. Keeping in view these rules, let us inquire what were the kind of laws to which this prohibition was principally designed to extend. There can be no doubt that by it was intended to be corrected some, if not all, of the evils which had crept into the system of legislation of many of the states, and had excited a considerable alarm for the security of private rights. In many parts of the union all confidence in public faith was extinguished. This had been occasioned by frequent interferences on the part of some of the legislatures in matters which were not believed to fall within their ordinary and legitimate sphere of action. By recurring to the history of the times, and the reasons assigned by the friends of the constitution for the insertion of this article, much useful information will be obtained, and we shall be at no loss to discover to what species of laws it was then thought that the interdiction was principally supposed to extend. During a long and arduous struggle for independence, much individual misery and distress were unavoidably produced. Driven from their homes, and cut off in many cases from their ordinary pursuits, the resources of many were either exhausted,

or so much impaired as to induce the legislature on various occasions to listen to the pressing calls which were made upon them to devise some mode for their relief. Various expedients were accordingly resorted to, and the practice of interfering between creditor and debtor became so very extensive and so inconsiderate, as in many instances to place the former entirely at the mercy of the latter, and that too, under laws which were apparently introduced with no other view than that of affording to the debtor a temporary relief from the pressure occasioned by the then situation of the country. Bills of credit, and paper money were issued, and by legislative sanction were substituted for gold and silver in the discharge of debts. Creditors in some places were liable, without any adverse proceeding on their part, to be cited by their debtors, and to have the sums due to them tendered in a currency whose depreciation at the time produced the most glaring injustice. On their refusal to submit to this mockery of justice, the public securities, which had been thus offered, might be deposited with some public officer, and the creditor was for ever barred from any recovery. In other cases payments were authorised to be made by instalments. In some states the interest which had accrued during the war, or a part of it was remitted; while elsewhere not only a paper currency of no value, but almost every species of property, was made a legal tender, and no stipulation however solemn, to pay in the precious metals, afforded any security to the creditor. The courts of justice in many of the states had been closed altogether, and the creditor thus withheld, at least for a time, from every appeal to the laws of his country, while his debtor might be squandering the property out of which his demand ought to have been satisfied. Geographical limits had also been resorted to, for the purpose of introducing the most odious discriminations between creditors themselves. For those who resided within the British line, and those who were without those precincts, distinct remedies were prescribed, and the scales of justice so unequally graduated, that while the latter might

recover the whole of their demands, the former, if they sued, were compelled to receive public certificates of one description or other, of so little value as scarcely to indemnify them for the costs of suit which they were obliged to pay. Very great liberties had also been taken with British creditors, many of whom complained, and too justly, of the impediments which continued to be thrown in their way even after the return of peace. These frequent interpositions of private concerns, during a period of great public and private suffering, and for many of which the condition of the country and the great object at stake, might seem to offer some apology, became so common, so intolerable, and so inveterate, in many places, that it became no easy matter, even after the restoration of peace and the acquisition of our independence, to lay them aside. There will therefore be in the statute-books of several of the states, after the termination of the war, many provisions of the same meddling and obnoxious character, which either changed the nature of contracts, or suspended the payment of them or authorized it in a way contrary to the plain engagement and meaning of the parties.

By laws of this description, which had become too dangerous and oppressive to be any longer borne, very extensive and great uneasiness was produced, and against them was raised a corresponding and almost universal expression of indignation and regret. Accordingly, to all the objections made against the prohibition on the part of the states, to pass laws impairing the obligation of contracts, we find the friends of the constitution every where, again and again urging the necessity of it, in order to put an end to the evils which had flown from acts of the kind which have been mentioned, and which had, after the revolution, been extended by designing and influential men, to many other cases, so as to increase, instead of diminishing the alarm which had been excited. To such acts we find them constantly ascribing the decay of commerce, the ruin of public credit, and the almost entire extinction of confidence between individuals, and pressing with vehemence the adoption of this article as one of

vital importance, and as the only guard and preventive against the promulgation by future legislatures of similar acts in derogation of private rights, however great the emergency might be deemed. But on no one occasion do we hear of any complaints against the power of passing insolvent laws; this practice had not arisen out of the calamities of war; it was brought with the first American colonists from the mother country; it was adopted, in one form or other, by all the British colonies in North America, without an exception that has been discovered as to any one which now composes a part of the United States. It must have originated wherever we find the practice of it, and perhaps it is not hazarding too much to say that it is universal, not only from a conviction that the encouragement of trade required it, and so are the recitals to many of the acts; but from those indelible principles which are implanted in the breast of every man, and which proclaim, in a language not to be misunderstood, that in every country, where imprisonment for debt is allowed, there must and ought to reside a power somewhere of compelling creditors to abandon their hold of the body of a debtor, who shall fairly, and under such restrictions as the law may provide, make a complete surrender of his property, to be divided amongst those whose debts some unexpected turn of fortune has rendered him unable to pay. In such cases, his future acquisitions, although here there may exist some diversity of opinion, should also be his own, or he will be restored to his freedom and family, not only without property, but without credit, and in many cases with such a heavy load of unextinguished debt, and so many liens on his future acquisitions as must stifle every exertion to make any. His freedom, in such cases, will be a mockery, nor will such a state of servitude to his creditors often prove of any service to them; for, sinking under a burden from which he sees no prospect of relieving himself, his ambition and efforts will be limited to the gaining of a bare maintenance for himself and family, knowing that neither he nor they can ever be benefited by any surplus. But whatever considerations may have

first called into practice a power of this kind, it is sufficient for our present purpose, that we find it in use in perhaps every state in the union, under some modification or other, at the time of the adoption of the constitution, and that the laws passed on this subject very generally, if not universally, provided not only for future cases of insolvency, but for those which existed at the time. If this be so, and that it was so to a very great extent is not denied, it must have been known to the friends of the constitution, who exerted themselves in favour of its adoption; and yet no arguments drawn from that source are to be found in the debates of any of the conventions, in favour of the prohibition. Nor is it recollected that those who were hostile to its adoption, ever objected to this feature of it, because of its liability to such construction, and yet such objections would have been heard from more quarters than one, if it had then been thought susceptible of the interpretation which the court is now expected to apply to it. It may also be observed, that if it had been thought necessary at that time of day to tie up the hands of future legislatures, in relation to this matter, it would have been more natural to have committed to congress a power of establishing a uniform system of insolvency, as well as of bankruptcy, or to have transferred to the general government an unqualified and express power in the premises; for it cannot be credited that a people who had been so long accustomed to laws of this kind, would have consented to deprive the state legislatures of the power of passing them, without at the same time delegating to that of the union some control over the same subject. Dissatisfaction may have existed and been expressed at the abuses which were committed under the sanction of such laws, for not more effectually protecting creditors against the frauds of their debtors, and such dissatisfaction is often heard at the present day; but never was the right or propriety of an interference in this way called in question.

To the practice of the states antecedent to and at the epoch of the adoption of the constitution, and to the silence

on this head of those whose attention was directly called to this article, may be added the uninterrupted and undisputed usage of all or most of the states, from that day down to the present time. Yet after the lapse of near thirty years, during which time scarcely a chasm or intermission is to be discovered in the usage of the state where the court is now holding, it is called upon to pronounce all its insolvent laws, so far at least as they operate on past debts, and all discharges under them of such debts, as repugnant to the constitution, and therefore void. Without adverting to the serious consequences of such a decision, with which the court has nothing to do, how, it may be asked, is the uniform practice which has been mentioned to be accounted for, but from a general and universal understanding, that such practice was no departure from any of the obligations which one state had contracted with the others? Can we believe that, before time was allowed to organize the general government, and while the instrument of its formation was undergoing the examination and criticism of able and industrious adversaries, any state could have passed laws of this character, not only without animadversion, but execute them without any objection from a numerous class of citizens, who are in general not the most inattentive to or ignorant of their rights? Would not a clamor, on the part of creditors, have been heard, from one extremity of the union to the other, against such an usurpation of power, if it had been viewed in that light? And if the legislatures of the several states could not have been brought back to a sense of duty by remonstrances against the exercise of such a right, would not applications have been made to the courts of justice, to arrest by their decisions the progress of such gross and frequent violations of the constitution? But not only have these laws been passed without a constitutional difficulty being ever suggested by any member of the legislature, at the time, but frequently as they must have been brought to the notice of the courts of the different states, and sometimes of the federal judiciary, it is not until very recently that the present objection has

been heard of. Congress too, in the only bankrupt law which they ever passed, introduced a provision, that it should not "repeal or annul the laws of any state, then in force, or which might thereafter be enacted for the relief of insolvent debtors"—many, if not all of which *then* in force, will, on examination, be found to be retrospective. Either then, these laws are not within the prohibition, or if they are, and the terms of it are so obscure as to have hitherto eluded the research of so many who must have had an interest in its discovery, it is the very case in which a court ought to rely for its true sense, on a general practice which has been so long submitted to. It has been said that a practical construction is of no importance, when a question arises on public acts of so important and solemn a nature as a written compact between several independent states. The instrument, it is said, should speak for itself. But if there be any thing in this remark, a decision of the Supreme court of the United States on the effect of a practice in fixing the meaning of the constitution, would not permit the court to listen to it. In the case referred to, a usage of only ten or twelve years, and which had once been interrupted by an act of congress, was deemed to settle a question, in which was involved the very independence of an important and co-ordinate member of the federal government, and that too in opposition to what many will think, as probably did the judges themselves who decided it, the plain and obvious letter and spirit of the constitution.

But aside from this contemporaneous and universal expression of public and private sentiment on this subject, the court is not very certain that it would have regarded a law of this nature, if the question were of earlier date, as "impairing the obligation of contracts."

This objection goes only to such of these laws as affect antecedent contracts. It may very safely be assumed, that most, if not all of the insolvent laws in this country, fall within this description, and an interposition by the legislature in this way seems absolutely necessary, if not inevitable,

wherever imprisonment for debt is allowed. Such laws cannot therefore be regarded as contrary to the first principles of the social compact, or opposed to those sound and wholesome rules of legislation which were intended to be preserved pure and inviolate by those who made the constitution. A power to pass such laws necessarily results from an antecedent state of things, and from the existence of a system, which if left to itself, without occasional controls on the part of the legislature, would produce permanent individual distress and ruin, and to an extent, highly injurious, not only to the state itself, but to the very parties, who might, in the moment of passion or disappointment, resort to it as a mean of coercion. This attribute of sovereignty, for as such it is regarded by the court, it was better that the states should retain, than to have relinquished it to the federal government. By the former it would be exercised within a less extended sphere, and of course with not so much danger of injury to the parties concerned, as if the same duty had been performed by the congress of the United States. If then the passing of laws affecting, in this way, past as well as future debts, has been in use within this state ever since its independence, and for many years while a colony, and if such practice has not only been acquiesced in, but was absolutely necessary, may it not be fairly presumed that every contract within this state, or to be enforced here, is made under a full knowledge of such practice, which must now be deemed a perfect right, and that this being known and understood by both parties at the time, the creditor has no right to complain if his debtor shall one day be liberated by virtue of an insolvent law which may be in force at the time of the contract, or which may be afterwards passed, not from the obligation or payment of the debt, but from personal confinement, on condition of making payment as far as he is able? The court has proceeded on a belief that most, if not all of the states had been in the habit of extending their insolvent laws to all debts, without any regard to the time of contracting them. Time has not been afforded during a very busy term to examine the statutes of

But if these constitutional objections are removed, it is alleged that the contract being made and being payable in Boston, cannot be affected by any discharge obtained under the laws of the state of New York. Under this head of argument the court has been reminded of a rule, which it is presumed, when properly understood, will be acknowledged by every one; that is, that the *lex loci contractus* must be resorted to, in order to ascertain the meaning of every agreement made abroad. This does not proceed from mere comity or courtesy towards other nations, but from the immutable principles of justice, which would be violated by applying to a foreign contract, when deciding on its obligation and effect any other law than that of the place where it was made; for how palpably unjust would it be for this court to pronounce void a bond executed at Canton, and payable there, because by it should be reserved a greater interest, which might be lawful there, than seven per cent per annum, which would render it usurious in this state? This is the meaning of the rule, and it is a salutary and a just rule. But out of it have arisen some dicta, which are ripening very fast into decisions of the most mischievous tendency, and between which and the rule itself it is difficult to perceive any connexion. It has been said that, as the nature and validity of a contract must be settled by the law of the place where it was made, so also it cannot be affected by any discharge of the debtor under the bankrupt or insolvent laws of the place where he resides, or of the country to which he belongs, or in other words, that a contract made in a foreign state, and with a view to its code, can only be discharged pursuant to, that is, as the rule is now applied, under the bankrupt laws of such state. Accordingly, suits have recently been maintained against bankrupts and insolvents, whenever they have been arrested, by process out of the court of any other state than the one in which they became so. Thus a citizen of Pennsylvania has not been permitted to sue in New York a debtor who may reside, and have been liberated under a law of the latter state; but if he can be found in Massachusetts, or else-

where, his certificate, it is said, will be of no avail, provided the contract were made in Philadelphia, or elsewhere in the commonwealth of Pennsylvania. This is not exactly the case here; but as these decisions are supposed to have a considerable bearing on it, the court will be expected to express an opinion on them. It has no hesitation in saying, that it considers them as forming part of a class of cases, which, it will one day be lamented, should ever have found their way into the commercial code of this country. They appear to proceed on a misapprehension of the rights of independent nations—but principally on a mistake in applying the *lex loci contractus*, as well to the remedy, as to the construction and validity of the agreement, contrary to all the adjudged cases on this head. They maintain that a debtor can never, under any circumstances, be discharged against the will of his foreign creditors, if his contracts with them be made where they reside, and with a view to the laws of their country, by any proceedings under the insolvent laws of the state of which the debtor is a member, but only by a certificate obtained pursuant to the bankrupt system, if any such there be, of the several countries in which his creditors may happen to reside. If the rule be not laid down precisely in these terms, such are its import and effect, and such or something like it, is the practice which is very fast introducing itself, under the sanction of it. If this be so, how is an American merchant, who may be indebted in several countries abroad, in case of misfortune, ever to get disentangled from his debts? No proceedings under the bankrupt laws of the United States, if there be any, not in conformity with the insolvent provisions of his own state, can do him any good. If he remain in his own country, trusting to the validity of such proceedings, perpetual imprisonment must be his doom, if his foreign creditors shall be as unrelenting as this rule is well calculated to render them; for no power there, it is said, can relieve him against this class of demands, but upon full payment of them, without a violation of the contract made abroad, or a disregard of the comity due from one nation to another. Ac-

according to this doctrine, he has no alternative left, but that of going to the different countries where he may be indebted, and there submitting to the proceedings established for the relief of unfortunate traders. And yet, it is not perceived how his foreign creditors will be gainers by exposing him to so great a hardship; for if he shall commence his career of insolvency, as he naturally will do, in his own state, the assignment of his estate made there will leave nothing for the creditors abroad, it being admitted, that by it the whole of his property, wherever it may be, will pass. In like manner, a debtor who shall fail, and have creditors of this description in different parts of the union, will have to make a tour of the United States, before he can commence business again, in order to seek relief under the insolvent system of each state. Is it not more reasonable to suppose, as the case most undoubtedly is, that every contract, wherever made, must proceed on an expectation, that the parties shall perform it according to the terms, if they are able; but if there shall be an inability in either to fulfil his part of the agreement, that then the other party shall be placed on as good, but not on a better footing, as to any remedy which he may seek for its breach or non-performance, as those who may reside in the country of the debtor. This, in case of insolvency, I should regard as a performance of the contract *secundum legem loci contractus*, unless it were shown, that some different stipulation, in the event of insolvency, had been entered into, which is not pretended, and probably never did form a part of any contract, where no specific security was taken; and if it did, would hardly be enforced to the prejudice of other creditors. If a remedy against the person of an insolvent debtor be allowed to his creditors abroad, which is denied to a domestic creditor, what is it but to give the former a preference over the latter, which neither justice will sanction, nor the *lex loci* in any case expect.

On this subject I had an opportunity of expressing an opinion many years ago, in one of the cases which has now been cited. To that opinion I adhere, and shall adhere until

a different rule shall be presented by a tribunal which has a right to control and direct the judgment of this court. I then stated, that a surrender of all a bankrupt's effects, under the laws of the state in which he permanently resided, ought to operate as a discharge from his creditors in every part of the world; and I will now add, without any regard to the court or country in which the action against him may be prosecuting. Whatever fault may be found with this opinion, I am mistaken if it will not be found to conform with the sentiments and practice of commercial men, and to be for the benefit of trade, that it should be so. Merchants generally believe, that if their debtors abroad, no matter how the debt was contracted, or when payable, be regularly discharged by the bankrupt or any other law of the state in which they reside, and his estate be divided among all his creditors, they are exonerated every where. The rule so often cited from Huberus and Casaregis, has no application to such a case. When the latter speaks of contracts territorial and ex-territorial, it is most manifest that he means nothing more, than that a contract made in one country, is not to be construed by the laws of another.—Now the difficulty is, to find out what the *lex loci contractus* has to do with the case of a future insolvency, or how the law of one country can differ from that of another in this respect. It is presumed to be law every where, that a man is to pay according to his contract, but if he be unable to pay any where, what then has the *lex loci* to do with the case? Is it part of that law, or is it any part of the contract express or implied, that no government upon earth shall be allowed to interfere for his protection in case of misfortune and insolvency; or if it does, that such protection shall not extend beyond the limits of the state in which he lives, and not even there, as is contended in this case. Is it not for the advantage of foreign creditors, and will it not comport better with the interest of all parties, that when an insolvency occurs, they shall be placed on an equal footing with domestic creditors. It may be ruinous to the debtor, but of what advantage will it be to his absent creditor to have him con-

signed to a prison during life, without any right to a participation on his part, in the property in the hands of his assignees; for it has not yet been pretended, although this might as well be proved by the *lex loci*, that the creditors abroad has a right to a dividend of his estate, and to the body of the debtor in the bargain. If care be not taken, the great solicitude which has recently been discovered for creditors in other countries, will produce decisions, if such have not already been made, which, in case of bankruptcy, will do them more harm than good. The truth is, all that amity, good faith, the contract of the parties, and the *lex loci*, if it has any thing to do with the question, can require, is that their interests and rights shall not be postponed, or in other words, that they shall be as well taken care of, as those of other creditors. Yet the court of King's Bench in *Smith and Buchanan*, went on the sole ground of the *lex loci*, when it decreed on the inefficacy of a discharge in Maryland against the claim of a British creditor. "It is impossible," says lord Kenyon, "that a contract made in one country is to be governed by the laws of another." It is also remarked in this case, that it might as well be contended, that if the state of Maryland had enacted that no debts due from its own subjects, to the subjects of England, should be paid, the English creditor would be bound by it. A law of this kind would not have been enforced by any court of this country, but between the iniquity and injustice of such a statute, and one which placed the British on a level with the American creditor, this court perceives no resemblance; while the one is calculated to excite the just indignation of any man, the other is well entitled to universal approbation. If in all its provisions it did not resemble the bankrupt laws of England, its effect in producing an equal division of the insolvent's estate was the same, it ought not to pass unnoticed, that at the very moment of rendering this judgment, the court admits that an assignment under the act of Maryland, would vest the property of the bankrupt, wherever it might be, in his assignees. If so, it would seem to follow, that the debtor

himself ought to be discharged; for if the law takes from him, and against his consent, his property every where, and secures it even from the pursuit of a foreign creditor, why should it not be allowed to offer a protection equally extensive to his person? Or why should he be placed in the very awkward situation of being liable to imprisonment abroad, when in that very country he may have more than property enough to satisfy the demands of his foreign creditor, but which has been placed out of his reach by an assignment previously made under the laws of his own state? And it may here be remarked, that the universal effect which is given to such assignments, is not among the least of the advantages which foreign creditors derive from the bankrupt or insolvent laws of the country where their debtors reside. It prevents the creditors near him, and who will be first apprised of his misfortunes and of the nature and situation of his property, from laying attachment on many parts of it, to the prejudice of those at a distance. This case will be dismissed with only one other observation. The merchants of the United States have never supposed that they can proceed in their own courts against British bankrupts, if found here, merely because the debt may have been contracted and payable on this side of the Atlantic; they receive and are satisfied with the dividend made in England, but shall hereafter make the attempt and succeed; it is to be hoped that the court which shall sustain so novel a pretension, will have more courtesy than to compare the bankrupt laws of England, which are perhaps as perfect as such a system can well be, with an act of parliament, which prohibits to American citizens the recovery of their just demands against British subjects. In the case of *Van Raugh* and *Van Arsdaln* in the Supreme Court of this state, we are only told that the question had been decided ten years before, but what the case referred to was, or on what ground the decision was placed does not appear. In *Smith* and *Smith* however, the court refers to the decision in *East*, and assign the same reason that is there given, and which has already been remarked on.

But this court is desired and expected to advance one step beyond all the decisions which have yet been made on this subject. Hitherto, an unfortunate debtor, even if he had heard of the few cases which have been mentioned, might think himself safe if he would but confine himself within the limits of his own state. Here he might confidently expect protection against the pursuit of every creditor without regard to his place of residence, or to the spot where the contract was to be performed. But even this security from imprisonment is now desired to be withdrawn from him, and this course of conduct is pressed on the court, not on the footing of a series of adjudged cases from which there might be no escape, for none such are produced; nor because it will accord with the general sense of the commercial world, for that it is believed is directly opposed to it: not because of any odious discriminations which are found in the insolvent law of this state, between territorial or extra-territorial creditors, for they are placed on a perfect equality: not because the interests of commerce will be advanced by it, for in such a state of things, none but men of the most enterprising character will dare to engage in it: nor yet because other countries practise on this rule, for nothing resembling it is pretended to be in use in any other part of the globe. Nor is it to be believed, that the Court of King's Bench itself, notwithstanding the solitary case which has been produced as to a discharge abroad, would disregard a plea of bankruptcy by a British debtor, against the claim of any foreign creditor, whatever might be the plea of contract or of payment. The court having already expressed its opinion on the inapplicability of the *lex loci contractus* to all cases of this kind, will only add that this rule has performed its office as a construction is given to the contracts according to such law, but in case of inability, a new state of things occurs, the only proper rule to govern which is, that care be taken to enforce an equal and fair distribution of an estate, under the laws of the country in which the debtor has his residence. Insolvent laws have been hardly and not very earnestly com-

pared by the plaintiff's counsel, to laws authorizing the payment of a debt with one cent in the dollar, and in a way and at a time different from the agreement of the parties. They do no such thing, they afford aid and sanction to no injustice, they violate no law human or divine, they leave the obligation of parties in full force, they create no inability, nor interfere between one who is able to pay, and his creditors, but when such inability intervenes, they step in and take care, or at least such is their object, that a complete surrender of the debtor's estate shall be made for the benefit of all his creditors; and when this is done, they compel the latter to observe towards him that mercy and forbearance which, in similar circumstances, they would wish and expect to have extended to themselves.

It seemed to be admitted on the argument, that if foreign creditors had been named in this act, they would have been barred. The court thinks them as much bound by the general and comprehensive terms of this act, as if they had been specially designated. Enough has already been done in their favour without clothing them with a prerogative not yet heard of, that of being exempt from every law, unless particularly named—nor is this the ground on which these decisions go. It is, that a state has no right to pass laws to discharge its insolvent subject from debts due abroad. But if the court has erred in the principles which it has adopted, or in the application of them to foreign creditors in general, the plaintiffs have no right to complain, for when a citizen of Massachusetts, where they reside, is imprisoned, at the suit of a citizen of this or any other state, he can, under the laws of that commonwealth, obtain his discharge, as to his person at least, without the creditor's consent, and such discharge is regarded, as it ought to be, as binding on all the courts of that state.

Sitting, therefore, in the state which passed the insolvent act in question, and to which no constitutional objection appears, this court is not sensible that it departs from a single

adjudged case in England, or in this state, when it decides on the universal validity of a discharge obtained under it.

Upon the whole, this court is of opinion, that the act of the 3d of April, 1811, is an insolvent, and not a bankrupt law; that if it be of the latter description, the several states have a right to pass bankrupt laws for themselves until congress shall establish a *uniform* system on the subject: that an insolvent act extending to past, as well as future debts, is not a law "impairing the obligation of contracts," within the meaning of the constitution; and that a federal court, sitting within this state, is bound to support a discharge under such law against the claim of a foreign creditor; although the debt due to him may have been contracted and made payable at his place of residence.

The present verdict must, therefore, be set aside, and a verdict and judgment entered for the defendant.

R. H. Sedgwick, of counsel for plaintiffs.

Fay and Emmet, of counsel for defendant.

VIRGINIA: COURT OF CHANCERY, JANUARY, 1817.

The Attorney-General, vs. And. and Jane C. Broaddus.

Upon an information.

THE female defendant, being the sister of the other defendant's former wife, the information, in the usual form of pleading, charged the defendants with having intermarried contrary to one of the provisions of the 13th section of the act concerning marriages, in the Revised Code, page 195, and concluded in the usual form; and in conformity with the provisions of the act; so much of that section, as authorized the said information are in these words: "if any man hath married his wife's sister, every person or persons so unlawfully married, shall be separated by the definitive sentence or judgment of the high court of chancery; and the attorney-

general, upon any information made to him of any such marriage, shall and may exhibit a bill to the judge of the said court, against any person so unlawfully married, who shall be compelled upon oath to answer the same—and upon such bill and answer, and the depositions of witnesses, where the same shall be necessary, the said court shall, and may proceed to give judgment, and to declare the nullity of such marriage, and moreover may punish the parties by *fine*; and if the court see fit may cause the parties to give bond with sufficient security, that they will not cohabit hereafter, in such penalty as the said court shall judge reasonable: *Provided always*, that no punishment by *fine* shall be imposed on any person until the same, shall have been assessed by a *jury*, duly impanelled at the bar of the said court. *And provided also*, that nothing herein contained, shall be construed to render illegitimate the issue of any marriage so annulled.

To this information, the defendants, by counsel, filed their plea in these words: “ These defendants by protestation not acknowledging or confessing all or any of the matters or things in the said bill contained to be true in the manner and form as the same are therein and thereby alleged, do plead in bar, and for plea say, that by the eighth section of the bill of rights, made and declared on the 6th day of May, 1776, entitled, “ A declaration of rights made by the representatives of the good people of Virginia, assembled in full and free convention; which rights do pertain to them, and their posterity, as the basis and foundation of government,” it is expressly declared: “ That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land, or the judgment of his peers.” That by an act of assembly, passed the 5th of December, 1785, entitled “ An act declaring that

none shall be condemned without jury trial, and that justice shall not be sold or deferred:" the legislature explained its sense of the meaning of the above recited article of the bill of rights, by enacting: "That no freeman shall be taken or imprisoned, or dissiezed of his freehold, or liberties, or free customs, or be outlawed, or expelled, or otherwise destroyed, nor shall the commonwealth pass upon him, nor condemn him, but by lawful judgment of his peers, or by the laws of the land." That these defendants are advised and insist, that any act of assembly contrary to, or inconsistent with the said bill of rights or any part or article of the same, is unconstitutional, void, and of no effect; that the information of the attorney-general, in this behalf, is to all intents and purposes a criminal prosecution; founded upon the act of assembly referred to in the said information: and that the said act of assembly, is, so far as the same enacts and provides that any person who shall contract any marriage contrary thereto, "shall be separated by the definitive sentence or judgment of the high court of chancery; and the attorney-general, upon any information made to him of any such marriage, shall, and may exhibit a bill to the judge of the court, against any persons so unlawfully married, who shall be compelled upon oath to answer the same; and upon such bill and answer, and depositions of witnesses, where the same shall be necessary, the said court shall and may proceed to give judgment, and to declare the nullity of such marriage, and moreover, may punish the parties by fine, and if the said court see fit, may cause the parties to give bond with sufficient security, that they will not cohabit hereafter, in such penalty as the said court shall judge reasonable: *Provided always*, That no punishment by fine shall be imposed on any person until the same shall have been assessed by a jury, duly impannelled at the bar of the said court;"—a penal statute authorising a criminal prosecution in the mode therein prescribed, and is contrary to, and inconsistent with the above recited article of the said Bill of Rights, and is therefore unconstitutional, void, and of none effect; and therefore doth not vest in this

honourable court any lawful jurisdiction to hear and determine the matters in and by the said information of the attorney-general, alleged and charged against these defendants, do therefore humbly demand the judgment of this honourable court, whether they or either of them ought to be compelled to make any other ^{or} further answer to the said information.

To this plea there was a general replication; and the cause was argued with very great ability by the attorney-general for the commonwealth, and by Mr. Wirt and Mr. Leigh, for the defendants; and it being late in the term, the following decree was pronounced *by the Chancellor*.

This cause came on this day to be heard on the information of the attorney-general, on behalf of the commonwealth, and the plea of the defendants, which the parties agreed might be considered as a demurer to the information, and was argued by counsel; on consideration whereof, the court being of opinion with the attorney-general, that, if this be a *criminal prosecution*, this court should not entertain it; the court then hath only to inquire what is a *crime*, to come at the meaning of the prosecution, and the answer is, in the language of all the elementary writers upon the law, that a crime is an act committed or omitted, in violation of a public law, either forbidding or commanding it; the act, under consideration, is a public law, the violation of it then, is a crime; a prosecution for it, must of necessity be a criminal prosecution; hence, it was not competent to the legislature, to confer jurisdiction thereof upon this court, for reasons assigned in the demands; and therefore, this court, considering so much of the act in question, as contrary to the Bill of Rights, and for that reason void, doth adjudge, order, and decree, that the information be dismissed.

neighbourhood shall be reduced to the condition of vassalage, and the subordinate magistrates will be enabled, through the medium of influence and elections, to dictate to the legislative, and to overawe the executive department of the state; and similar cases will be determined very differently, when many hundred individual magistrates are to give the rule. To repeat the language of a very celebrated commentator, we shall fatally experience that "these new tribunals, erected for the decision of facts without the intervention of a jury, are steps towards the establishing an aristocracy, the most oppressive of absolute governments," unless taking advantage of the admonition of the same enlightened author, we feel that "it is above all a duty which every man owes to his country, his friends, his posterity, and himself, to guard with the most zealous circumspection against the introduction of new arbitrary methods of trial; which under a variety of pretences, may, in time, imperceptibly undermine the trial by jury, the best preservative of liberty."

3. Because the bill has an oppressive and pernicious tendency. The emoluments of a justice must depend upon his practice, and the practice will usually depend upon the patronage of the wealthy, or the litigious part of the community. Calculating, therefore, upon the natural imperfections of the human character, the temptations to oppress the poor, the helpless, and the tranquil, will be almost irresistible, nor any mean be suggested to avert the evil, while the transaction passes in the private room of a justice's house; and particularly if the aid of counsel (as once was contemplated) should be denied. Whatever may be the perversion of facts, whatever may be the distortion of law, little consolation can be derived from the mere right of appeal, since the accumulation of costs could hardly be sustained by a *poor man*.

THOMAS M'KEAN.

SOUTH CAROLINA: CIRCUIT COURT U. S. JUNE, 1816.

Fisher et al. vs. the Sybil.—Salvage.

Johnson, J. If ever there was a case in which the claimants on a libel for salvage were thrown upon the protection of a court, this is one. There is not a witness to any thing that occurred on the ocean, who is not interested in increasing the compensation. Even Dangerfield, the master, to extricate himself from damages and censure, finds his interest coincide with those of the libellant, in making out a justification for abandoning the vessel. However the witnesses may differ in representing the merits of each other, they all, with the exception of one (I mean the Indian seaman, Francis) concur in making this out a case of great distress, and complete abandonment. The practice of this court permits the individual in such a case, to exhibit his own merits on his own oath, and it is but too evident that most of the salvors have attached much importance to the idea that this is a case of derelict, and that the salvage in such a case must necessarily consist of a large proportion of the goods saved. It is only in the contest for the distribution of this proportion that they disagree, and each one showing too strong a disposition to present himself as the hero of the adventure.

Their advocates also have ably and ingeniously argued that cases of derelict are cases in which the salvors are peculiarly entitled to a liberal reward; that the courts have manifested the most striking liberality in such cases, generally giving one half, sometimes as far as three-fifths, never less than one third. The property libelled being of considerable amount, near one hundred thousand dollars in value, it becomes very material to the salvors to maintain this doctrine.

But whoever looks into the history of the law of salvage, will find it to be, as now acknowledged, in Admiralty Courts, comparatively of modern origin. Even the meaning of the term derelict, is now materially varied from what it was ori-

ginally, and the idea that the salvor is entitled to any thing like a *de jure* compensation, has long since been exploded. In the language both of the civil and common law, derelict as applied to chattels, meant a thing voluntarily abandoned, so that the first finder became the rightful possessor, if he reduced it into possession. Such were the *bona vacantia* of the civil law; in which, in a state of nature, it is evident, whether the thing be found on sea or land, that the individual would acquire an absolute and exclusive interest; but in a state of society, whether he should take it wholly to himself or to the use of his sovereign; or what portion of it he should retain, and with whom divide the residue, must necessarily depend upon the provision of positive law. The barbarous notions in which originated the droit de Bris of France, and the royal privilege of wreck in England, have long since (among the rulers, if not among the people of those countries) given way to the progress of moral, intellectual, and commercial improvement.—But there is reason to think that wreck and derelict were anciently confounded. It is perfectly natural for the inhabitant of a sea coast, whose subsistence perhaps from his earliest recollection has been drawn from the ocean, to consider whatever is cast up by the sea as a bounty from Providence to the first finder. But the possessor of the soil would also put in his claim, and either exclude the casual trespasser, or insist that the bounty was sent to himself, and confer on the finder a portion or compensation only as a gratuity. Such at this day is the law of England, with regard to the property of a pirate or enemy cast away on the coast. It is not so easy to find a satisfactory reason for the idea which too certainly has prevailed, that a ship-wrecked mariner may be treated as a ship-wrecked enemy. Yet in the history of navigation, we may find an apology, if not a justification for this barbarous notion.

The first nautical expeditions were certainly equipped for the purposes of war or plunder. The coasts of France and Great Britain were long infested and devastated by the

cruisers of Norway and Denmark. If then every vessel that appeared threatened plunder, slavery and bloodshed, it was natural to consider every vessel that was wrecked as an enemy on whom heaven had executed vengeance. The benign spirit, which religion has breathed into modern ethicks would assign to an enemy in misfortune the treatment of a friend, but death, plunder and slavery may have been sanctioned by retaliation, and was certainly the law of the victor in that day. I can scarcely admit the disgraceful supposition that afterwards as commerce extended, and the eyes of men became opened to the necessary distinction between wreck and derelict, the cruel purpose of removing a claimant or a witness could have operated to expose the lives of ship-wrecked persons, but there is too much reason to infer from the laws which have been passed for their protection, that some protection was necessary. In the laws of Oleron (31st art.) it is asserted that this often happened: and as late as the year 1798, in a case which occurred before sir William Scott (the *Aquila*) we find a magistrate alleging on oath, that the plundering of a wreck is customary on that part of the coast of England where he resided.

For the modern acceptation of the word derelict we may very safely take the definition of sir Leoline Jenkins, as given us by sir W. Scot: "boats or other vessels (or, he may have added, any goods washed overboard at sea, or floated away from land) forsaken, or found on the seas, without any person in them, of these the admiralty has but the custody, and the owner may recover them in a year and a day." And such the form of the libel usually filed in such cases, declares it to be, to wit: "found floating to and fro on the high and open seas." Such goods are in the first instance pronounced derelict in the restricted sense of the word, to wit: abandoned from fear or necessity. But after the year and day they are considered as pure derelict, as having been absolutely and voluntarily abandoned, so that the sum or portion reserved in the registry of the court becomes a droit of the admiralty. If

here is any thing in the law of salvage which distinguishes the case of a salvor or derelict, in the modern acceptation of the term, from any other salvor, I have never been able to discover it. Whether we refer to the reason of the thing, or to adjudged cases, the court appears to possess an equal latitude of discretion in all cases of salvage, and rewards either by adjudging a compensation in ratio or in number, as it think reasonable. One general rule, and that alone appears to run through all the cases, and that is "the compensation must be liberal, and that too not only with a view to the value and endangered state of the thing saved, the risk incurred, the skill and labour bestowed, but with a view to the general interests of commerce in promoting exertions in such cases, and to the interests of mankind in rewarding and promoting generous and magnanimous actions. The court undertakes to direct not only the justice but the generosity of the claimant. However, the ancient idea that wreck and derelict was the property of the crown may have been exploded in modern times, it is very certain that something like that idea has been preserved in the adjudication, between salvors and claimants, as to the quantum which each shall retain of the thing saved. Such unlimited discretion has always been assumed, as looks very much like acting under the principle that "*cujus est dare ejus est disponere.*" That it is not a mere case of quantum meruit is universally allowed; and why the court should prescribe a rule to the generosity of the claimant under any other idea, is difficult to discover. For the same reason it is that a compensation has been awarded to an apprentice boy instead of his master, and hence perhaps also such liberties are taken with the reasonable rules of evidence as suffer parties to make out their case upon their own affidavits, as they do in some measure in prize cases, which are certainly boons of the government. If the case of derelict, according to the modern acceptation of the term, be considered, with a view to the reason of the thing, there will be found to be in it no ground necessarily attaching to it a superior claim to all other cost-

pensation. It is very easy to conceive a case which cannot come within the definition of derelict, which would rally all the best feeling of the heart around it in support of a reference. Take the case of a vessel whose crew is sick, or exhausted, or devouring each other for food; or take the case of a vessel without boat, on fire, or stranded, with her whole crew on board, and in danger every moment of going to pieces, where not only the vessel, but the lives of the crew are saved. In a case of pure derelict, as of a pirate, where the court knows at the time of adjudication, that the residue must be adjudged a *droit*, and where, of course, it is a mere bounty to the government as well as to the individual, it may very well be conceived that the court would be very liberal in awarding salvage; but when the party himself, the original owner, puts in his claim, and sets up the plea of misfortune, the case is widely different; and traces of this distinction will be found to exist in the ancient sea laws of Europe. Sir W. Scott in the case of the *Aquila*, in considering the question whether a moiety could be claimed *de jure* by a salvor, has said, that he could find no trace of such a right in the *Consolato del Mare*. As applicable to the case of derelict, according to the modern meaning, this eminent judge is unquestionably right; but the modern meaning was not probably attached to the word when those laws were compiled, for they are of great and no ascertained antiquity. But in the case of pure derelict, where the other moiety is to be given to the lord and the poor, the one moiety is by the *Consolato del Mare* given to the salvor (c. 252) and hence probably originated the English rule which appears to have existed in a remote period, that the thing saved should be divided by moieties between the salvor and the king. But by the laws of Oleron which are of the highest authority in this court of any of the ancient systems, all persons were required to aid and assist in saving shipwrecked goods, "and that without any embezzlement or taking any part thereof from the right owners; but however, there may be a remuneration or consideration for salvage to such as take pains

therein according to right, reason, or good conscience, and as justice shall appoint." (article 29.) This article probably laid the foundation of the jurisdiction which this court is now exercising. In the 45th article of the second fragment of the law of Rhodes it is enacted "that if a ship be surprised at sea with whirlwinds, or be shipwrecked, any person saving any thing of the wreck, shall have one fifth of what he saves." Although this article does not say what is to be done with the residue, yet it evidently relates to a case of restoration, as appears by the next or 46th article, according to which "if any one find a boat, which has broken loose from a ship and drifted to sea, and preserves it safe, he shall restore every thing as he found it, and receive one-fifth as a reward." Although the counsel in the *Aquila* argued that one half was the usual and favourite salvage in case of derelict, yet unless they meant to confine themselves to voluntary or to total abandonment, it would rather seem that (in ancient times at least) *one fifth* was the favourite proportion in cases like the present, or even stronger cases. For shipwrecked effects found on the high sea or "fished up out of the bottom of it," the ordinance of Louis XIV allowed a third to the salvor, the remainder to be restored to the owners, sect. 45, art. 1, s. 27. If then we compare the ancient sea laws with modern decisions, we find that, except in case of pure derelict, they were hardly as liberal as the courts of admiralty are at the present day; and modern liberality has, I fear, been too much exerted, from a want of attention to the distinction between cases, where the residue becomes a droit, and those in which it is restored to the original owner. I cannot think the argument a sound one that salvage in fact falls upon the underwriter who has been paid for the risk; for the *spes recuperandi* is one of the perquisites of the insurer and which combines with others to enable him to underwrite at a less premium. Nor can I admit that the compensation to the salvor must be in a certain ratio to the thing saved, or that that ratio is not to be diminished from relation to the amount.

The question to be decided by the court is always one to which no fixed rule can be assigned. How shall the salvor be compensated? is this inquiry. And how is it possible to produce uniformity in the decisions of courts, where the judges are to act on circumstances endless in their variety and combinations, and of which any two men may take different views? Or how is it possible to detach the mind from considering the amount saved both with a view to increasing the compensation as to the claimant on the one hand, and diminishing it as to the salvor on the other? As to the question whether it shall be in proportion or in numero; if the judge, knowing the value of the thing saved, is unrestricted in fixing the compensation, it is immaterial to bind him down to the fixing of it by way of ratio, since it is so easy to bring it to numerical precision. It is true, that it has been most usual for courts to adjudge in proportion: but the reason of that is evident. Courts of justice, perhaps more than any other constituted bodies, will receive a tone in their proceedings from the mores majorum. At a time when commerce was carried on by actual exchange of merchandise, it would have been the most ample and natural mode of compensation to make an actual division of the thing saved, if susceptible of division. But at the present day, money, the medium of commerce, expresses the value and all the subdivisions of property with a more convenient precision, as it is the standard by which the mind is accustomed to compare the value of things. That such a practice should have prevailed is easily accounted for from this cause. It is evident, that whenever a legislative power undertakes to affix a compensation by way of salvage, it can only do so by assigning a *proportion* to the salvor. This is done in all the ancient systems of sea laws: and this very naturally led to the practice of assigning a proportion for salvage in the adjudications of the admiralty courts. But under the practice of modern times and the laws of Oleron, I hold an admiralty court to be at large to decree compensation either numerically or by ratio, as it deems proper. But could I be in-

duced to attach any importance to the idea of derelict abstractly considered I should not adjudge this to be a case of derelict even in the modern acceptation of the term. The vessel was not found derelict upon the ocean, and when she was deserted by her crew, all the witnesses prove an express abandonment of her to Mr. Fisher, or the ship's company of the Margaret—"There she is, make what you can of her." Her actual state of distress then, and the merits and compensation of the respective salvors shall govern my decision, without attaching any technical importance to the epithet by which her state may most correctly be designated. And here while the practice of this court permits each claimant to make the most of his merits on his own affidavit, it is impossible for the mind to detach itself from the conviction, that the testimony of any man is to be received with due caution, where he swears in his own behalf. And we are naturally led to the consideration of those facts, concerning which there can be no dispute, and those parts of the testimony of each witness which have no immediate bearing upon his own interests, as furnishing the best grounds to form an opinion upon. As to the state of the vessel, the case furnishes satisfactory evidence on all points except two leaks. The main and mizen masts were gone, with all their rigging, and most of their spars, and in going overboard they had carried with them a part of the bulwark. The long-boat, at the time of the abandonment, though leaky, was fit for use. Afterwards it appears to have been materially injured. Water and provision she had in abundance, and a ship's company consisting of sixteen persons, all of whom, except one or two (perhaps three) were fit for duty. Her foremast and bowsprit, with all their rigging were perfect; and the hull of the vessel new, stanch, and strong, so much so, that a ship-carpenter of great skill and experience says, "the men ought to be hanged who would have deserted her." Her nautical instruments were in sufficient preservation, her reckoning accurate, and they were at the time of meeting not above three hundred miles from our coast, not

above four hundred from Norfolk, where the vessel was owned, and about the same distance from Philadelphia and New-York, where her cargo was owned. The wind was tolerably fair for the first port, and there was little difficulty in making any port in the whole extent of the American Atlantic coast. On the state of her leaks, the evidence is various and contradictory. When they took possession of her, Fisher says, she had four feet water in her hold: Jones makes it only thirty or forty inches. Fisher says she made eighteen inches per hour, whereas in port she did not make above seven; but on this point there are three facts in which all concur: 1st that four hands pumped her dry before 12 at night; 2d, that only seventy-three bales of her cargo were damaged, and those so little as to sell for above twenty cents per pound: 3d, that the leaks did not cause the abandonment, for they were known when the ship first hailed the *Margaret*, at which time the captain of the *Sybil* expressed no idea of abandoning her. Some of the witnesses, indeed, say, that on hailing a second time, Dangerfield declared they had sprung a fresh leak. But Dangerfield in his protest says nothing of the kind, and he would not then have omitted it had it been true. I therefore conclude that the leaks did not very greatly endanger her safety.

We now come to the very material cause of the abandonment, to wit, the state of the rudder; and this indeed was the only cause—for the protest and the evidence show that before this discovery, the captain was so far from intending to abandon her, that he only requested a supply of cordage and sails from the brig, and upon being informed that they could not spare any, he made sail away on his course. On this point the evidence is also various and contradictory.—Dangerfield in his protest alleges that it hung together only by a few splinters; but this is a gross exaggeration. The rudder must have been injured in the gale, and the vessel had been nearly two days working with it in that condition, when she fell in with the *Margaret*. Besides, the ship-carpenters who have examined it in port agree that it required but little skill, la-

bour, or risk to mend it. Captain Todd thinks that any gentleman then in the court room could have mended it; and several other witnesses agree that it was a very poor apology for abandoning the ship. To this we may add, what is very well known; that the loss of a rudder is by no means fatal, as a ship may be steered by her sails or by a cable, or by means of both in co-operation. I now come to the most disagreeable part of this case, to examine the respective merits of the salvors—and first of Fisher. This gentleman claims salvage on account of personal services; on account of being the owner of the Margaret, and on account of the freight of her cargo, and the sum awarded him by the District Court would amount to more than twenty thousand dollars.

I have pondered long upon the merits of Mr. Fisher, not uninfluenced by a reluctance at differing very widely from the opinion of the District Court, or of underrating the services of any man, especially of one of such high pretensions. But really no effort can bring my mind to place this salvor on a pre-eminent footing of merit. I look in vain* throughout his conduct to discover one trace of magnanimity or disinterestedness. Nothing appears in it but selfishness. He first claims a very high salvage from the owners, and then in the spirit of monopoly finds some pretext or other for excluding his fellow adventurers from sharing the golden harvest. I am far from cherishing the Utopian notion, that pure disinterestedness is to be expected from man. But salvage is not a compensation for what we do for ourselves, but what we do for others. And the man who in the prosecution of selfish views can forget what is due from man to man—I will not add from a brother sailor in a state of distress—comes with a bad grace into this court to lay claim to that liberality which is the acknowledged meed of gallantry and generous sentiments. The compensation of such a one should be limited to mere quantum meruit. I am led to apply these remarks to Fisher from the following considerations, drawn from his own testimony. 1. It is in evidence that Fisher was bred a shipwright, and his skill, dexterity, and

exertions as such, form a chief ground of his claims to compensation. It is also in evidence that when the Sybil approached the Margaret the second time, Fisher came on board, and he and Dangerfield went into the cabin and examined the state of the rudder through the windows. Upon being then consulted expressly with regard to the rudder, he told the captain,—to use his own words—“that it was in an extremely bad state.” Now the contrary of this has been expressly proved, and he himself proved it by repairing it the next day. That he was ignorant of its actual state, and of the means and facility of repairing it cannot be supposed, whether we consider his skill as a shipwright, or his readiness to go on board immediately and take charge of her with only four men. Then what did moral duty point out as the conduct to be pursued by him on that occasion. Not surely to increase the alarm of the captain by magnifying his danger, but to point out the means by which it could be repaired, and tender his assistance in repairing it. Doing otherwise looks too much like a premeditated design to take advantage of the fears, ignorance and imbecility of the captain, to get possession of the ship. But after getting possession of her and putting on her the partial refitment with which she reached this port, if he had in his subsequent conduct shown that he was at all influenced by considerations drawn from a view to the interest of the owner, this would have operated to remove the unfavourable impression which his conduct respecting the rudder was calculated to produce.—Instead of which we find, that when he was but three hundred miles from the American coast, he bore away for Jamaica, distant at least one thousand miles, at a time when those seas are much more exposed to the danger of tempestuous weather than the north coast of the United States. I do not deny that he was justifiable in doing this, for after being in possession of the vessel, they had a right to judge for themselves how far keeping company with the Margaret outweighed all other considerations, but if in their decision, as to their course, the interest of the owners gave way to personal

considerations, this certainly lessens their right to demand compensation from those owners. And as the vessel was sufficient to have made the voyage to the United States alone, no one can doubt that the interest of the owners was pretermitted in the attempt to go to Jamaica. I consider Mr. Fisher for these reasons, as a salvor who had nobody's interest in view but his own, and as entitled to compensation in proportion to the incidental advantages resulting to the owners. And here may it not be asked, had the owners any cause to rejoice that the Sybil fell in with the Margaret? Would it not have been for their interest that the ship had not encountered her or any other vessel at sea? She was competent to make the voyage to the United States in all human probability, and they might then have repaired her, earned her freight, and escaped the payment of salvage. Certainly no service was rendered them by taking out the crew. And had not the crew been taken out, possessing as they did the competent means of saving their lives, in the effort to do so they would have saved the property. In one view therefore, Mr. Fisher may be considered as the *innocent cause* of doing the owners material injury. But it will not do to act upon that view of the case, for the cause of humanity forbids that the captain of the Margaret should have refused on any ground to take the crew of the Sybil on board when requested. It is therefore a case of salvage, but not a case of the highest order. And as no one could have left the Margaret without Fisher's permission, I certainly consider him as the *dux facti*, and as such ranked above all the salvors. But he cannot lay claim to the credit of having either navigated or commanded the Sybil, or having even discharged the duties of a mate on board of her. As to the individual merits of the salvors, it is not necessary to remark very particularly on the evidence respecting them. Jones evidently was master and navigator on board the Sybil. However Fisher may have been his superior on board the Margaret, he certainly ranked his former owner on board the Sybil. The whole crew received and acknowledged him

as captain. Rice appeared to have acted as next in command, and to have enjoyed an acknowledged superiority. Beech the landsman, a character always sneered at on board ship, did his best, and deserved much credit for having volunteered among the first, not a little in my opinion from a consideration of the doubts and fears which may reasonably be expected to attend a landsman in such an undertaking. With regard to the six coloured seamen who belonged to the original crew of the Sybil, some questions of considerable nicety and difficulty arise. 1st, Whether they are to be regarded as salvors, or referred to their original contract with the ship. 2d, Whether, if considered as salvors, they shall themselves receive their compensation, or it shall be adjudged to Fisher, or if not to him, to the whole ship's company of salvors. Fisher claims the whole, under an agreement which he sets up as having been entered into by these men to navigate the Sybil for twenty-five dollars per month. It appears that the day after they took possession of the Sybil they hailed the Margaret and inquired if any of the Sybil's crew who were then on board the Margaret "would volunteer" (that was the expression) on board the Sybil. These six men then came on board the Sybil; no agreement was made while yet in the Margaret, but after they are on board the Sybil they make this agreement, which is set up by Fisher. I omit here, as I have omitted all along, to make any reference to the evidence of Francis, as I could wish, if possible, to avoid giving weight to any man's testimony except where it makes against himself, or his interests are unaffected by the consequences. But I confess I feel a strong moral repugnance at admitting the claim of Fisher, so far as it is founded upon the services of these men. That he who claims twenty thousand dollars compensation, and who without the aid of these men could not have earned one cent of it, should be enriched whilst they who never, according to Rice's testimony, voluntarily quitted the ship, and who returned to it expressly as volunteers should be put off with scarcely enough to buy them a suit of clothes, carries with it

something very inconsistent with moral propriety, and I acknowledge that it is with pleasure I lay hold on any ground to get rid of the necessity of making such a decree. The case affords two sufficient grounds. 1st, It is acknowledged that they were called upon to enter as volunteers, and under that idea they came on board the Sybil. No agreement for wages was made on board the Margaret, and whether a parol agreement was made before the written agreement or not, still it was not made till they were in a situation in which every seaman feels that he is not a free agent. The confirmatory agreement made after their arrival in port, is liable to the same objection, and I here explicitly acknowledge that I am not satisfied with the fairness of the one or the other. But there is another ground of objection. Whatever may have been Fisher's situation on board the Margaret, when he entered on board the Sybil, associated with four others, their emigration was complete, and they assumed new relations, although they could not have quitted the Margaret without Fisher's consent, yet neither could he without their consent have forced them to quit her. When therefore they entered on board the Sybil, they had their rights as well as Fisher, and he could no more lessen their compensation as salvors for his own benefit, than they could his. The agreement, therefore, with the black seamen, if it operated to deprive them of their claim as salvors, enured to the benefit of the company of salvors; but they set up no claim under it, and acknowledge that it was not explained to these seamen that they were to forfeit their claim to salvage. But here another question arises—are these seamen, as relates to the owners, to be at liberty to depart from their original relation, and assume the new one of salvors? One thing only can sanction such a departure, and that is, they have not been in default. Their captain, against their will as Rice testifies, obliged them to quit the Sybil, and he could not afterwards control them to prevent their assuming this new relation. They were freed from their original contract, and at liberty to act for themselves; I shall therefore adjudge them entitled to a

compensation by way of salvage. But what is to be done with regard to Perry? He is clearly proved to be an absconded slave, and his owner has lost his services for several years. To this I reply, that whatever may have been my decision, had he been at the time hired out for the benefit of his owner, since he was in fact a runaway, his master must receive his compensation, and not himself. One more question remains to be disposed of. The ship had proceeded six hundred miles on her way to Jamaica, when Jones and the crew, without the consent and against the will of Fisher, altered their course in the night, and made for this port. Fisher contends that this was an act of mutiny, which worked a forfeiture of the rights of all concerned in it. But it appears to me that this deviation was the first unquestionably correct act done by the company of the salvors. Jones was unexceptionably the master, and even if we view Fisher as the owner, which is the highest grade to which he can pretend, his station at sea is inferior to that of the master. There could not be a mutiny then where the master headed the opposition. The ship's company had a right to alter the course for the good of all concerned, and more especially to make an alteration so materially beneficial to the owners of the vessel and cargo. It was the first instance in which Fisher's interest had given way to those of the owners, and this was violently opposed by him. Besides, if this forfeiture had occurred, it would not have been to the benefit of Fisher, but of the owners, and it would be absurd to adjudge that a cause of forfeiture which clearly tended to their benefit.

In the course of the argument, the case of the *Blaireau* was often cited; and that case was very justly considered as the best standard for governing our decision in this. I readily receive it as such; and think, that when compared with that, the merits of this case are strikingly inferior. 1st, The amount saved was only about two-thirds the present amount. 2d, The attempt to save the *Blaireau* was universally acknowledged to be attended with great danger, almost desperate, such was her

leaky and shattered state: here the danger is universally allowed to have been but inconsiderable, as the loss of the masts in fact, in some measure diminished it. The distance navigated there, is stated to have been three thousand miles; true or false, is immaterial, if the court were under the influence of that impression. In this case the vessel was not navigated above twelve hundred. If the owners' interests had been considered, it need not have been navigated above four hundred. Whether the *Blaireau* was derelict or not, I have before declared technically immaterial, but I should think it unavailing to contend that Tooles being on board, could diminish the merit of the salvors. To the merit of saving the property was added the more important consideration of saving human life. Finally, it has been contended, that the owners of the ship in this case ought to be allowed their freight and general average, principally on the ground of their having precipitated a sale of vessel and cargo, so as to deprive the owners of an opportunity of tendering salvage and proceeding on their voyage.

If precipitating the sale is any ground of complaint, it is obvious that it can only be made against the district court, and not against the salvors. I am fully aware, that great and unnecessary loss to owners may be produced in such cases, as salvage can as well be ascertained by appraisement as by sale. But if a court has been unadvisedly led to order a sale in such a case, it is as against the salvors, *damnum absque injuria*. Freight and average can with no propriety be charged upon salvors, as both the freight and average are equally the result of the efforts in saving the ship and goods. That claim, therefore, must be wholly rejected.

Upon the whole, I shall decree to the salvors the one-fourth, of the net proceeds of vessel and cargo, and hesitate while I do so, under an apprehension that I have given too much. This will amount to more than twenty-one thousand dollars; of this sum let four hundred be paid to the pilot-boat *Opposition*, and in the distribution of the balance, I adjudge one third to the *Margaret*, her freight, cargo and crew. The

remaining two thirds to be divided into twenty-four parts, and distributed as follows: to Fisher, eight parts; to Jones, six parts; to Rice, three parts; to Beach, one part; to the five free seamen, and the owner of Perry the slave, each one part. In distributing the one third assigned to the Margaret, let the sum be also divided into twenty-four parts, sixteen of which are to be divided amongst the owners of the vessel, cargo, and freight, according to their relative value; in which distribution let the vessel be valued at three thousand dollars, the freight at four thousand, and the cargo at the rate which Fisher himself fixes the value in his testimony, valuing those articles to which he does not testify at the advance proved by him on others. The reason for adopting this mode of fixing the value of the cargo is this: the result is unfavourable to Fisher, but he cannot murmur at it, as it is founded on his own testimony, and Johnson, the owner, being on board, and having consented to the undertaking, is certainly entitled to salvage. In distributing the remaining eight shares of the Margaret's third, it is right that Darrel, the second mate of the Sybil, should participate. He was entered mate to the Margaret, and, what I attach more importance to, he appears to have been desirous of remaining by his own ship. Kennedy is also entitled to some distinction in this division. Let Wilson then have three parts, Darrel one part and a half, Kennedy one part, and the balance be equally distributed among the remainder of the Margaret's crew. The balance of the proceeds must be distributed among the claimants according as they shall prove interest. The claims of freight and average, even as between vessel and cargo, I wholly reject, as the abandonment put an end to the contract, and I consider the salvage paid by the freighters as a substitute for both freight and average. The decree of the district court* is thus revised, and annulled so far as it is inconsistent with this decree, and the register will report to this court such evidence relative to interest, as

* That decree awarded fifty per cent. salvage.

will enable it to make a final order of distribution, after paying all costs, which are to be charged upon the entire amount of the sales.

As to the specie, which it appears was taken from the *Sybil* and saved in the *Margaret*, I think it not necessary to make any observations respecting it, as it does not appear to me to be at all subject to our jurisdiction. Had any thing improper been done respecting it, we should have enforced such terms upon the salvors as would have been consistent with equity and good conscience: but nothing with this view appears to require the interference of this court.

CONNECTICUT: SUPERIOR COURT, JUNE, 1811.

Brown et. al. v. Union Insurance Company of New-London.

Resistance by the masters and mariners of a neutral vessel to the search of a belligerent is barratry.

This was an action on a policy of insurance to recover for a loss of the cargo of the ship *Franklin*.

The insurance was stated to have been made for the sum of four thousand dollars of said cargo at and from *Martinique* to the port of destination in the *United States*, "from the dangers of the seas, fire, enemies, assailing thieves, restraint and detainment of princes and people, of what nation or quality soever, *barratry of the master or mariners*, (unless the assured were owners of the vessel,) and from all other misfortunes and losses, that should come to said cargo." The declaration then stated, that the *Franklin* being laden with a cargo to the amount of ten thousand dollars, on the first day of *November* 1808, sailed from *Martinique* for the *United States*, and on the voyage was captured by certain vessels of war belonging to his *Britanic* majesty, and by them was held in custody, so that the cargo was lost to the plaintiffs. There was an account also

stating the loss to have been by the *barratry of the master and mariners*, in this, "that the master and mariners did, within and during said voyage, resist the capture and search of his majesty's brig of war *Ferret*, by means of which said cargo was afterwards, by the brigs of war *Melpomene* and *Circe*, wholly detained from the plaintiffs, and lost."

The general issue was pleaded, and on the trial, the plaintiffs, to make out their case, proved the execution of the policy; their property in the cargo; that the vessel was owned by *Elisha Denison* and by *W. and S. Robinson*, citizens of the *United States*; that a capture was made as stated in the declaration; and that they had duly made an abandonment to the defendants. There they rested their case, claiming as for a total loss.

The defendants, in their defence, proved a capture by a *British* ship of war; a rescue by the master and mariners, a recapture by another *British* ship of war; and produced a copy of a condemnation passed in the court of vice-admiralty in *Gibraltar*, in which the ground of condemnation was stated as follows: "Pronounced the said vessel called the *Franklin* and her lading to have been unlawfully rescued and retaken by the master from the possession of the prize-master and others, put on board thereof from his majesty's sloop-of-war *Ferret*, *Wells* commander, whilst proceeding to a *British* port for adjudication, and as such, or otherwise, subject and liable to confiscation; and condemned the same as good and lawful prize to our sovereign lord," &c.

On these facts the court charged the jury, that the plaintiffs were by law entitled to recover. The jury found a verdict in favour of the plaintiffs accordingly; and the defendants moved for a new trial on the ground of a misdirection. The question being reserved for the consideration of the nine judges.

Goddard and *Law* in support of the motion, contended,

1. That the resistance to a search by the master and crew of the ship *Franklin*, and the forcible rescue of such ship, after capture, was a breach of neutrality.

The sentence of condemnation pronounced by the court of vice-admiralty, at *Gibraltar*, is conclusive evidence on this point. It appears on the face of it, to have been passed by a court of competent jurisdiction, and upon grounds warranted by the law of nations. *Bolton v. Gladstone*, 1 *East*, 155. *The Maria*, 1 *Rob. Adm. Rep.* 287, 314, 315, (*Amer. Edit.*) *Garrels et al. v. Kensington*, 8 *Term Rep.* 230. *Barker v. Blakes*, 9 *East*, 283. *Church v. Hubbard*, 2 *Crance*, 234, 235. *Bas v. Tingy*, 4 *Dall.* 43. *Vattel*, B. 3. ch. 7. s. 114. 1 *Marsh.* 434, 435, a. (*Condy's edit.*)

2. That the acts of the master and crew in resisting a search, and rescuing the ship out of the hands of the captors, were justifiable, and not barratrous. *Nutt v. Bourdieu*, 1 *Term Rep.* 323. *Vallejo v. Wheeler*, *Cowp.* 143. *Phyn v. The Royal Exchange Assurance Company*, 7 *Term Rep.* 505. 2 *Marsh.* 515 a. *Abbott*, 194. (*Story's Edit.*) *Lex Merc. Amer.* 279. *Crousillat v. Ball*, 4 *Dall.* 294. *Hood's Executors v. Nesbit et al.* 2 *Dall.* 137. *The Two Friends*, 1 *Rob. Adm. Rep.* 232. 233. (*Amer. edit.*) *Pos and Graves v. The United Insurance Company*, 1 *Caines' Cas.* 11. *Kendrick v. Delafield*, 2 *Caines' Rep.* 67. *Thurston v. The Columbian Insurance Company*, 3 *Caines' Rep.* 89. *Park*, 84, 364. *Stamma v. Brown*, 2 *Stra.* 1173.

Daggett and Gurley, in behalf of the plaintiffs, contended,

1. That the conduct of the master and crew, in resisting a search and rescuing the ship, was not in violation of the law of nations, nor a breach of neutrality; and that the decree of condemnation was not conclusive upon this point. 2 *Marsh.* 507. (*Condy's edit.*) *Elting et. al. v. Scott et alt.* 2 *Johns. Rep.* 163. *Dawson v. Atty*, 7 *East*, 367.

2. But if it should be deemed that such conduct of the master and crew created a forfeiture of the rights of neutrality, then in that case, it constituted the crime of barratry; and that therefore, the insured were entitled to recover. *Vallejo v. Wheeler*, 1 *Cowp.* 143, 150, 156. *Moes v. Byrom*, 6 *Term Rep.* 379. *Earle v. Rowcroft*, 8 *East*, 126. *Marsh.* 515 a, et seq. (*Condy's edit.*) *Knight v. Cambridge*, 1 *Stra.* 581. *Abbott*, 194, in nota. (*Story's Edit.*)

Ingersoll J. This was an action brought by *Jesse Brown and Son* against *The Union Insurance Company* in *New London*, (the same being an incorporate company for making marine insurance,) to recover for a loss of the cargo of the ship *Franklin*. The declaration stated, that on the 5th day of *August* 1808, the plaintiffs were owners of the cargo to be shipped on board of the ship *Franklin*, then lying and being at the island of *Martinique*, in the *West Indies*, or bound to *Martinique*, and from thence to her port of destination in the *United States*. That the plaintiffs proposed to said company to assure them four thousand dollars of said cargo, to be shipped on board of the *Franklin*, after the same should have been shipped, at and from *Martinique*, to her above port of destination; and, that the cargo so to be shipped, they would warrant to be *American* property. That said company, for a *premium* of nine *per cent*, by a policy of insurance duly executed, did assure to the plaintiffs, the sum of four thousand dollars of the above mentioned cargo, at and from *Martinique* to the port of destination in the *United States*, "from the dangers of the seas, fire, enemies, assailing thieves, restraint and detainment of princes and people, of what nature or quality soever, barratry of the master or mariners, (unless the assured were owners of the vessel,) and from all other misfortunes and losses that should come to said cargo." The declaration then stated, that the *Franklin* being laden with a cargo to the amount of ten thousand dollars, on or about the 1st day of November, 1808, sailed from *Martinique* for the *United States*, and on the voyage was captured by certain vessels of war belonging to his *Britannic* majesty, and by them was held in custody, so that the cargo was lost to the plaintiffs. There was a count also, stating the loss to have been by the barratry of the master and mariners, in this, "that the master and mariners, did, within and during said voyage, resist the search and capture of his majesty's brig of war *Ferret*, by means of which, said cargo was afterwards, by the brigs of war *Melpomene* and *Circe*, wholly detained from the plaintiffs, and to them lost," &c.

The plaintiffs, to make out their case, produced the policy of insurance, duly executed by said company, in which it appeared that said company made the insurance as above stated. They also proved their property in the cargo, [and that the vessel was owned by Elisha Denison and W. and S. Robinson, citizens of the United States; and that a capture was made as stated in the declaration; and that they had duly made an abandonment to the defendants. They then rested their case, claiming as for a total loss.

The defendants in their defence, proved a capture by a British ship of war, a rescue by the master and mariners, a recapture by another British ship of war, and produced a copy of a condemnation passed in the court of vice-admiralty in Gibraltar, in which the ground of condemnation was stated as follows, to wit, "Pronounced the said vessel called the Franklin, and her lading to have been unlawfully rescued and retaken by the master and others put on board thereof from his majesty's sloop of war Ferret, Wells commander, whilst proceeding to a British port for adjudication, and as such, or otherwise, liable to confiscation; and condemned the same as good and lawful prize to our sovereign lord the king." &c.

There was in the court below, a verdict and judgment for the plaintiffs to recover their loss aforesaid; the court directing the jury to return a verdict in favour of the plaintiffs on the aforesaid facts. The jury accordingly so returned their verdict, on which, the court as above stated, gave judgment in favour of the plaintiffs.

The defendants below, to wit, said insurance company, moved for a new trial, on the ground, that the direction of the court was wrong; and prayed to have the question reserved for the opinion of this court, whether there ought not to be a new trial of the cause?—It was argued in favour of a new trial, by the counsel for the insurance company, that the decree of condemnation by the court at Gibraltar, was conclusive evidence of resistance to a search, as it appeared by the decree, that the taking and holding in custody, on the part of

the captors, was for the purpose of ascertaining the fact, whether or not there was enemy's property on board? It was further urged, that the rescuing the ship out of the hands of the captors, by the captain and crew, proved conclusively a breach of neutrality.

Upon this state of facts, it was urged, that there could be no recovery, unless the rescuing by the master and mariners should be considered as barratry, which, it was said, it clearly was not, as it must be supposed to have taken place for the benefit not only of the master and mariners, but also of the owners.

On the part of the plaintiffs, it was urged against a new trial, that the decree of condemnation did not decide the question of neutrality, as resistance to a search was justifiable; but at any rate, if it was not so, it amounted to barratry, and on that ground it was said the judgment was right.

My opinion is, there ought not to be a new trial, and on the ground that the rescuing and retaking of the ship *Franklin*, was barratry in the master and mariners. In order to determine whether such rescuing and retaking was barratrous, it may be necessary to take into consideration the right of search. This right, though at various times disputed, yet is now established in Great Britain, by various decisions of the courts of that country, founded, as is supposed, on the law of nations.

A very pointed decision in favour of this right, and that resistance to a search is a breach of neutrality, is found in the case of *Garrels et al. v. Kensington*, 8 Term Rep. 230. That was a case of capture, rescuing and afterwards a re-capture, and a condemnation on the ground "of a violation of neutrality, by means of the rising of the master, supercargo, and crew of the captured vessel, on the captors, and retaking the vessel; declaring the same also to be contrary to the law of nations, and the faith of treaties." The action was brought against the underwriter on a policy of insurance on goods, the cargo on board of the vessel captured and condemned under the above circumstances. Indeed, the question in that case

was much the same, if not precisely the same question which is made in this case, except, that there was no averment in the declaration of a loss by the barratry of the master and mariners, and of course, there could be no recovery on that ground. The court of King's Bench unanimously determined in that case, that there could be no recovery against the defendant. The judges expressly maintained the right of search, and that resistance to such right was unlawful. On no other ground could judgment have been given in favour of the defendant, the underwriter.

The case of *Saloucci v. Johnson*, where the right of search seems to be questioned, mentioned in Park 364, and in Marshall 301, was taken up and commented on by them; and they endeavoured to make out, that the case of *Garrels v. Kensington* was different from that, but if not different, they overruled the doctrine laid down in the former case.

The right is also recognized in *Barker v. Blakes*, 9 East. 292.

That this doctrine is founded on the law of nations, is proved by Marshall in his treatise on insurance, from page 306 to 317, where, for this purpose, he refers to Bynkershock and Vattel, writers on the law of nations, as well as to the *Consolato del Mare*, which he says is "one of the most ancient collections of marine laws now extant."

The subject is also elucidated, and the question put beyond all doubt, by the judgments in the English court of admiralty, in the case of the ship *Maria*, 1 *Rob. Adm. Rep.* 287, one of the Swedish vessels sailing under the convoy of a Swedish frigate; which case is recited in the above pages in Marshall's treatise.

The right of search being established, the consequence necessarily follows, that resistance to this right is unlawful, and a breach of neutrality. The question, however, still remains, whether the act of resistance, as between the insurer and insured, shall be denominated barratry. It is said in this case, and has been said in other cases of the like kind, that

barratry always carries the idea of *fraud*, of *crime*, with it, and that also, to constitute barratry, it is essential, that the act or acts claimed to be barratrous, should not be done with a view to promote the interests of the owners, but to promote that which is diametrically opposite to it, to injure or destroy such interest: that the acts of resistance and rescuing in the present case, must be supposed to be done for the benefit of the plaintiffs, and had there been no recapture, would undoubtedly have been approved by them, and consequently, that they were not barratrous. To prove this proposition, several authorities were cited, in which, it had been determined, that a deviation for the purposes of trade was not barratry; for though such deviation was contrary to the orders of the owners, yet being avowedly for their benefit, it could not come under the denomination of barratry. The same authorities were also cited to prove, that there must be something *fraudulent*, something *criminal* in the act or acts claimed to be barratrous, in order to make them so. Among the cases cited for this purpose, were *Stamma v. Brown*, 2 *Stra.* 1173, *Nutt v. Bourdieu*, 1 *Term Rep.* 323, and *Phyn v. Royal Exchange Insurance Company*, 7 *Term Rep.* 505.

I am of opinion, however, that the acts of resisting a search and rescuing the ship, in the present case, were barratrous acts. If it be a clear principle, that those acts were unlawful, as being contrary to the law of nations, it strikes me, the consequence must inevitably follow, that they were barratrous acts. I go upon the ground that they took place without the knowledge or consent of the plaintiffs; for so it appeared, and nothing contrary thereto was pretended. Let the right of search be once established, and all resistance to it, must of course be unlawful. For it is perfectly absurd to say that one man may resist another clothed with authority, in the legal exercise of that authority. Such resistance then being unlawful, must be denominated *criminal*, for, unless a forcible resistance to the legal exercise of a right, established by law, be criminal, I hardly know what is. It will not do to

say, that the unlawful acts of the master and mariners were the cause of the loss of the property insured, yet they were intended for the benefit of the plaintiffs, though unauthorized by them, and if so, were not barratrous. The point is, were they unlawful? Were they unauthorized? If so, a pretended intention of benefit to the plaintiff will be unavailing.

But decided cases put the question beyond all doubt.

In *Moss v. Byrom*, 6 Term Rep. 383, it was determined, that where a captain took *Letters of Marque*, and deviated from his voyage to cruize for prizes, and actually took one, and carried it into Bermuda, and there libelled for the benefit of his owners and himself, but soon after, his own vessel was driven on shore and lost there, it was barratry in him; and on that ground, a recovery was had by the owners against the underwriters.

Cases may be cited, wherein it has been held, that a non-payment of duties by the master, which caused a seizure of the ship, was barratry.

But the case of *Earl and others v. Rowcroft*, 8 East. 126, *et seq.* I think, settles the present question. It was a case, in which precisely the same question did not come up, as came up in the present case; but the governing principles of it are the governing principles of this case. It was an action brought against the underwriter, "on a policy of insurance dated 28th January 1804, on the ship *Anabella*, at and from Liverpool to the coast of Africa, during her stay and trade there, and to the port of sale in the West Indies, with liberty to exchange goods, &c. and the plaintiff averred a loss by the barratry of the master." The great question in the case was, whether the captain's trading at an enemy's port, by means of which the ship was captured by an English frigate, and condemned, and so lost to the insured, was barratry? It was very ably argued, and all the authorities were brought up, and the judgment was rendered against the underwriter. It is a pretty long case, and I shall barely cite a part of the opinion of lord Ellenborough, in which, principles are laid down, which, as

I apprehend, must govern the present case. His lordship says, "it has been strongly contended on the part of the defendant, that if the conduct of the master, though criminal in respect of the state, were in his opinion likely to advance his owner's interest, and intended by him to do so, it will not be barratry. But to this we cannot assent: for it is not for him to judge in cases not intrusted to his discretion, or to suppose that he is not breaking the trust reposed in him, but acting meritoriously when he endeavours to advance the interest of his owners by means which the law forbids, and which his owners also must be taken to have forbidden, not only from what ought to be, and therefore, must be presumed to have been their own sense of public duty, but also, from a consideration of the risk and loss likely to follow from the use of such means."

Indeed, in the case of *Saloucci v. Johnson*, heretofore referred to, the court in giving their opinion, as stated by Marshall in page 302, say, that a ship warranted neutral, must so conduct herself as not to forfeit her neutrality; and, that if by the wilful act of the captain, she do this to the injury of the owners, it will amount to the offence of barratry." Park in his treatise states it as the opinion of Mr. Justice Buller in that case, "that if the act of the captain in resisting the search of his ship by a Spanish vessel at sea, had been a forfeiture of his neutrality, it would have been barratry."

Thus in Great Britain, I think, this question is settled.

In a case also, before the Supreme Court of Pennsylvania, reported in 2 *Binney*, 574 to 581, chief justice Tilghman gives a decided opinion, that rescuing a vessel is barratry. He says, "we have the opinion of judge Buller, that the act of a neutral master, which forfeits his neutrality, is barratry. It has not, I think, been contended by the defendant's counsel, that a rescue is not unlawful. On that point I agree with the opinion of judge Washington, in *Doederer v. The Delaware Insurance Company*, where he thus expresses himself: "That the attempt to rescue the vessel, was unlawful, and afforded a

ground for condemnation, is proved by the opinion of the best informed jurists, and has received the sanction of the common law courts in a variety of instances." He adds that this doctrine was admitted by the counsel of the assured." "Upon the whole," says chief justice Tilghman, "my opinion, formed, indeed, during the course of this trial, and therefore, not so much to be relied on, as if after argument in bank, is that if a rescue was committed, it was an act of barratry."

My opinion, therefore is, that there ought to be no new trial.

In this opinion *Mitchell* Ch. J. *Swift*, *Trumbull*, *Edmond*, *Smith*, and *Baldwin*, justices, severally concurred:

Reeve, J. It is contended, that the recapture of the vessel was barratry, and on this account it was condemned; and thus a loss ensued to the owners by this wrong act of the captain. If the law was indeed so, that the rescue of the vessel was an unlawful act, and that every unlawful act of the master, by which loss ensues, is barratry, then the insurers are liable, aside from another consideration which I shall notice presently. For arguments' sake, I admit that the master had no right to rescue the vessel; but I deny that the consequence is, that the act done was barratry.

It is laid down by a writer of high authority in the mercantile world, that "*non omnis navarci culpa est barataria, sed solum tunc ea dicitur quando committitur cum præexistenti ejus machinatione et dolo præordinato ad casum. Casaregis, dis. 1. n. 77.*"

In *Phin v. The Royal Exchange Assurance Company*, 7 Term Rep. 505, it is laid down by lord Kenyon, that a deviation which occasioned the loss of the ship, although a wilful one, was not barratry, unless there was a fraudulent view in the captain at the time. The case was, the captain's instructions were to proceed directly to Jamaica; the ship was carried out of her reckoning, and was found to be between the Grand Canary and Teneriffe. Her direct course to Jamaica, was south-west; but he bore away to Santa Cruz, which was

north-west; she was there embargoed, and, war breaking out betwixt England and Spain, she was made a prize. The principle that governed in this and all other cases is, that if the probable consequence of the thing done, is not to endanger the property of the owners, there is no fraudulent view, nothing criminal towards the owners. The consequences of going to Santa Cruz, were not foreseen, nor could be conjectured with any probability of their occurrence. But whenever the probable consequences of the unlawful act done, will be a prejudice to the owners, although done with a view to their benefit as well as his own, it is barratry. This is deemed fraudulent, or to use a more appropriate term, criminal, towards the owners.

In *Moss v. Byrom*, 6 Term Rep. 379, a ship chartered for a voyage from Liverpool to the Bahamas and back; on the voyage to Liverpool she took on board letters of marque, merely to entice seamen to enter, but without necessary documents to give them validity; the master's written instructions were to sail directly to Liverpool; he, however, cruized for prizes, and fell in with an American and plundered her, and then captured a French vessel and sent her to Bermuda, and followed her there to procure her condemnation: during his stay, his ship was stranded and cargo lost; this was barratry. Because, 1. The plundering the American was prejudicial to the owners, and would subject them to loss. The cruising for the purpose of capturing endangered the property of the owners, by falling in with a superior force. Every cruiser in time of war, runs a risk of being taken, which risk is foreseen. The loss of the vessel and cargo, in this case, was not improbable, from such conduct.—In the case before stated, the conduct was such, that no probability of loss could have been conjectured, more in going to Santa Cruz, than to Jamaica.

We find that the act done must be something of a criminal nature committed *against the owners*. The case of *Nutt v. Bourdieu*, 1 Term Rep. 323, demonstrates that an unlawful act as it respects others, not owners, does not constitute bar-

ratry. However unlawful it was, as it respects the captors in the present case, to recapture, yet it was not a criminal act towards the owners; or in other words, the tendency of the act was not to destroy or injure the property of the owners, but to preserve it for them. It may be criminal enough against the captors to warrant a condemnation, and yet not be criminal, or any breach of trust towards the owners; but on the contrary, it was done for their benefit, and the probable consequences of the act done must be considered as beneficial. No case will be found, I trust, in which it has been held to be barratry, where the act done was done for the benefit of the owners, and the probable consequences were, that it would be beneficial to them. I do not mean to be understood, that where the act done is with a view to the benefit of the owners, it may not be barratry, if the act is unlawful, and the probable consequences are, that injury will follow; or the act is attended with great hazard to the property of the owners, and by that hazard the property is lost.

It has been determined, in England, that if a master sails out of port without paying duties, in consequence of which the ship is forfeited, this is barratry. Now, whether this was done for the benefit of the owners, or to save the duties to himself and charge them to the owners, does not appear; as this kind of fraud is very common in that country, it is most likely this was the real fact; it is direct fraud, and of course barratry. But suppose it was done for the benefit of the owners, yet it is barratry. It was a breach of trust in him, and the natural tendency of the act was loss;—it was the probable consequence of the act.

In the case of *Valejo v. Wheeler*, *Cowp.* 153, where the master changed his course, and went a voyage to Guernsey for his own benefit only, and the ship was lost, it was held to be barratry. This was criminal to the owners; for without any view to their interest, but to his own only, he endangered their property, as every voyage does; it was a fraud practised upon them.—But it ought to be remarked, that she was not

lost on the voyage to Guernsey, but after she returned, and was pursuing her voyage as directed by the owners: but barratry having been committed, the insurers were liable. So in the case before the court, if it was barratry to the owners, that is, a crime committed against them, then, if the British had not retaken the vessel, but she had been destroyed by the perils of the sea, or tempest, on her voyage home, the insurers would be liable. Can any person conceive they would have been liable in that case? nay, barratry is a crime punished with great severity; and if this act was barratry, then the master if he had arrived safe in port, would have committed a crime worthy of punishment. This is an idea wholly inadmissible. It is true, this act of the captain turned out eventually to be against the interest of the owners, by the intervention of a re-capture, an event not foreseen, or probable; at any rate, the rescue of the ship had no tendency to produce the event.

In the case of *Phyn v. The Royal Exchange Assurance Company*, 7 Term Rep. 505, justice Lawrence says, "he knows of no case where it is said, that the act of the captain is barratry, because it is against the interest of the owners:"—"no," says he, "it must be done with a criminal intent;"—and nothing can be clearer than that this criminal intent must respect the owner; it must be criminal towards them; and in this sense it is laid down by the whole court, that to constitute barratry, there must be fraud; and because there was none intended in that case, the court held that there was no barratry, although there was a wilful deviation, and no sufficient reason why it was made.

Sometimes we find it laid down, that it is never barratry where the act was done with a view to benefit the owners. The jury was so directed by the court, in the case of passing by Marseilles to Genoa; but for this I do not contend. I know the courts have determined breaches of trust to be barratry, where the act done was with a view to benefit the owners. I would not then be supposed to rely on this opinion, in the present case:—and no man can read several of the reports, with-

out perceiving that it was the opinion of the judge who tried the causes, that to constitute barratry, the act must be done with a view to injure the owners, or at least, that it would injure them. In the case of *Stamma v. Brown*, 2 *Str.* 1178, lord chief justice Lee says, barratry must be *ex maleficio*, with intent to destroy, waste, or embezzle the goods; and of course, there appearing no such intent, notwithstanding the injury done, the act was held not to be barratry. A deviation he says, with a view to burn, sink, destroy, &c. would be barratry.

But I do not rely on these opinions, though frequently to be found; for I admit, that although the master has no such object in view as to injure, nay, if he has a directly opposite object in view, *viz.* to benefit the owners; yet, if he does an illegal act, the natural tendency of which is to expose to risk the owners' property which is now in perfect safety, and the probable consequences of which would be loss, and loss ensues, it is barratry. On this ground, the case of *Earl v. Rowcroft*, 8 *East*, 126, can be supported. To risk a trade with the enemy forbidden by law, on a coast where the British constantly keep their cruisers, without the consent of their owners, and where there is no room to presume any, is putting to great hazard their property. This may well be considered a breach of trust, and of course barratry. Lord Ellenborough, in pronouncing the opinion of the court, observes, "that a disregard to laws by the master, will not constitute the act of barratry, unless they were such laws as the owners relied upon his observing." It was not the unlawful act of trading with an enemy, that of itself rendered it barratry, for it would not have been so, if the owners had directed him so to do; for in that case no fraud or imposition would have been practised on them; but where no such orders were given, nothing can be more reasonable than to suppose, that they relied upon it, that he would not enter upon an unlawful traffic and thus expose their property to such imminent danger, which was safe whilst engaged in a lawful trade.

Is there in this case such a presumption, that the owners relied upon it, that if he, being neutral, with neutral property only, was captured, and on his way to port for adjudication, where experience has taught us there is so much risk of condemnation, he would not embrace an opportunity to rescue their property, if an opportunity presented? Would they consider such an act as an imposition on them, and a breach of trust? If it is not to be thus viewed, it is not barratry. The universal commendations bestowed by owners on their masters, when their property is in this way preserved, and the generous rewards that are frequently given to them for such acts, demonstrate that it is not viewed as an act that is fraudulent, and done with a criminal intent towards them.

The sense of mankind is better learnt from such transactions, than from any metaphysical disquisitions, forever unsatisfactory to every man whose mind is not darkened with scholastic jargon.

Had this vessel arrived safe, would it have entered into the mind of any man, that this transaction was barratry? A criminal, fraudulent act, and a breach of trust? And yet, it was as much so as if she did not arrive safe. The true criterion is, as laid down by lord Ellenborough, that if the act done was an unlawful act, by which the property was endangered, and such an one as it was to be supposed the owners had confidence would never have been done, of which they could not approve, it is barratry; for it is an imposition on them. But although the act is unlawful, and although the property is already in great danger, yet may probably be preserved, if the act done is such as it may be fairly presumed they approve, it is not barratry. If any man can conceive, that the rescue of a vessel and cargo proceeding to port for adjudication, belongs to the first class, he will consider this rescue as barratry; but, if he believes it is an act which belongs to the second class, however unlawful it may be, he will never deem it barratry. If a certain conduct in a master, is generally viewed by mankind, and especially by owners, as commendable, and meets with

general approbation, it would be a strange conclusion, in a particular case, to suppose such conduct in a master, should in that case, be considered a fraud upon them, and an act of barratry. I appeal to the numerous plaudits bestowed upon such conduct by owners, so often to be found in news-papers. I appeal to the many generous rewards bestowed for such conduct. Nothing can be more distant from the thoughts of owners, than to condemn it as fraudulent and barratrous. It is the very thing, that could access have been had to them, they would have directed: It is the very thing their hearts would have approved of, if it had come to their knowledge before the recapture. Shall they now be permitted to treat it as fraudulent, as in the case in *8 East*? On the ground that lord Ellenborough put that case, it is to be presumed that the owners disapproved of such conduct, because it was unlawful, and of course, it was a fraud upon the owners. The presumption that the owners disapproved of that conduct, might be very reasonable, knowing that the trade with the enemy was illicit, and especially as it respected the articles of traffic. The owners whose property was wholly secure, might have very strong objections to such trade, whereby their property was put to imminent hazard; and had they been consulted, would have forbidden the act. How very different is this case? The property was not safe: it was captured; and experience had taught the owners that condemnation frequently followed the capture; so that the hazard of loss was imminent. This act delivered the vessel and cargo from the danger which then impended over it. A possible and remote hazard of recapture and condemnation still remained, which has been realized in this case; but had the owners been consulted, the presumption is, that they would have sanctioned the act; of course, no fraud could be practised upon them. I therefore, consider the defendants not liable on account of barratry.

It is contended that whether it is barratry or not, it is a loss against which the insurance is made; and therefore, on that ground, the insurers are liable. It will be remembered,

that this insurance is not binding, unless the warranty of the plaintiffs, that the vessel and cargo were neutral, was complied with; neither is it binding, unless the insured take care that he do not by any act forfeit his neutrality; if he does, the policy is avoided, and there can be no recovery. There is no evidence but that this property was neutral property. I shall take it to be such; but I hold, that there was a forfeiture of neutrality by the rescue of the vessel. The sentence of condemnation, on that ground, is conclusive evidence of the fact of the rescue; and thus depends upon the question, are neutral ships bound to submit to visitation and search? On this subject I entertain no doubt that they are;—all I contend for is, that it is not barratry.

I find nothing in opposition to this opinion in the books, except only, an opinion expressed in the case of *Saloucci v. Johnson*. It must be admitted, that the opinion of the court was, that a neutral ship is not bound to submit to be searched. They also observe, that a ship is not bound farther than to notice the law of nations, and not the particular ordinances of other powers. This observation is doubtless correct; and the sentence in the Spanish court, states that the ship refused to be searched, and refused with force, having fired on the Spanish ship, contrary to the Spanish cruising orders. The court seem to suppose, that it was not therefore, by the force of the law of nations, that she was condemned, but because she violated the cruising orders of Spain; but if the cruising orders were in conformity to the law of nations, the resistance would be a forfeiture. The judgment in the case of *Saloucci v. Johnson*, it seems to me, may be correct without adopting the opinion there adopted by the court, that a neutral is not obliged to submit to be searched. What is the sentence of the Spanish court? That she had refused to be searched, and resisted with force, having fired upon the Spanish ship contrary to the cruising orders of Spain. It is not said in violation of her neutrality, or contrary to the law of nations. What is the evidence which we have, that she refused to be searched, &c.?

The sentence tells us, because she fired upon a Spanish ship; but is this conclusive evidence of a breach of neutrality? Does not the master's answer repel the conclusion, that being hailed under false colours, he supposed that the Spanish ship was a Barbary corsair? There is nothing in the sentence to contradict the idea; and under such circumstances, it could be no breach of neutrality, or violation of the law of nations. All that is said, is, that it was contrary to the Spanish cruising orders. What they were does not appear in the sentence; and if they were any way different from the law of nations, they were not binding upon neutrals.

The opinion there given is a solitary one. All the writers that I have seen, recognise the right of search. Grotius and Bynkershock speak of it as the known law of nations; and it seems to me idle to say, it being a matter of force, it may be resisted; for although it be a matter of force, yet it must be admitted, that it is lawful force. In all arrests it is a matter of force; but to admit the idea, that therefore, the officer who arrests may be resisted, would be to introduce confusion, and subvert all regular government.

On this point, Vattel, a writer of the highest authority, is decided. He maintains the right of search in the belligerent and lays it down as incontrovertible law, that a neutral ship which should resist such visitation, may be seized and condemned on that account.

In the case of *Garrels v. Kensington*, 8 Term Rep. 230, the question is settled, that every belligerent cruiser has a right to visit and search a neutral, and that resistance to it is a forfeiture of neutrality. This is no new opinion, adopted to answer a particular purpose, but one that is perfectly conformable to the ancient and most approved authors on maritime law.

Such also, is the decision in the case of the *Maria* a Swedish vessel, reported in Marshall on Insurance 311. *Vid.* 1 Rob. Adm. Rep. 287. A more luminous decision, and supported by more irrefragable arguments, I do not remember to have seen. I conclude, therefore, that the belligerent has a right

to visit and search, and use the force necessary; and it being a lawful force, it cannot be lawfully resisted; and if resisted, it is a forfeiture of neutrality, and a good ground for condemnation; and by means whereof, the insured having, by their policy, warranted the property neutral, and by their own act forfeited all benefit from that neutrality, cannot recover on the policy.

The only doubt that has arisen in any mind, in the investigation of this subject, is, whether the right of the belligerent extended any farther than to visit and search; provided no property was found but neutral property, and the attempt to send into port was of course unlawful. In such case the point, however, was adjudged in the case of *Garrels v. Kensington*, which was the case of a ship with neutral property, captured and sent into port for adjudication, and rescued from the prize-master and seamen, put on board by the master and crew of the capturing ship, and again recaptured; and for this rescue the ship and cargo were condemned.

There is a point of light, in which I will endeavour to place this case, which, I apprehend, will demonstrate that the insurers are not liable; that although the conduct of the master in rescuing this vessel might be considered as barratry in other cases, it could not be such in this case, as to render the insurers liable. What is the barratry in this case? It is agreed it was the rescue of the vessel; thus forfeiting the benefit of neutrality, by which means the vessel was condemned. The ground taken then is this; the masters' conduct was such, that he forfeited the benefits of neutrality. This was an unlawful act, and the very one by which the owners lost their property; and of course, barratry. It is on this ground that it is contended, and it is the only ground upon which it can be contended that the insurers are liable. We will for a moment advert to the policy. Upon what condition do the insurers warrant against the hazards mentioned in the policy? on this, that the insured warrant, that their vessel and cargo are neutral, and that nothing shall be done that shall forfeit that neutrality; for

this is implied in all warranties, that the property is neutral; and if an act is done that forfeits this neutrality, the insurers are discharged. And here the very thing is done, viz: the rescue of the vessel, which forfeits the benefits of neutrality; and thus, the insurers are discharged. The same thing which it is contended is barratry, and subjects the insurers, is the very thing which, by the policy, it is agreed shall discharge the insurers. What is the language of the policy in the mouths of the parties? Is it not this; say the insurers to the insured, we will subscribe the policy and insure against the hazards there named, provided you will engage that the ship and her cargo is neutral, and that no act shall be done which forfeits her neutrality. The insured answer to this, we agree; and the insured, accordingly, engage in the policy, that if any act is done, which is a forfeiture of the vessels' neutrality, they will have no claim against the insurers. An act is done which is a forfeiture of neutrality; yet the insured claim against the insurers; because they say, that this act is barratry, against which the insurers insured; or in other words, it is true we agreed never to call upon you, if a certain event took place. That event has taken place, and we call it barratry, and you are liable. Nothing can be more absurd than to suppose the parties contemplated the forfeiture of neutrality, as the barratry insured against; for this would be to suppose, that they had agreed that the insurers should not be liable, if there was a forfeiture of the neutral character; and at the same time agreed, that in that event, they should be holden. From the nature of these warranties, on the part of the insured, they are conditions precedent. No liability attaches on the insurers, unless these warranties are sacredly performed. It was, therefore, absolutely necessary, that the vessel and cargo should be neutral, and that this neutral character be preserved, or the insurers were not liable. The language of the policy, most manifestly is, in the mouth of the insurers, if you the insured, warrant the vessel and cargo to be neutral, and that she shall preserve her neutral character, we insure against barra-

try; but if you do not do this, we will not be liable. To this the insured agree, and put it on that ground, that ship and cargo are neutral, and will preserve a neutral character. Can it be conceived, that when she forfeits her neutral character, this is the barratry insured against? If it is, then the law is so, that the very act which releases the insurers from all liability, is the act which renders them liable.

Brainard, J. concurred in the opinion of judge *Reese*.

New trial not to be granted.

SUPREME COURT OF PENNSYLVANIA. 1817.

The Farmers and Mechanic's Bank, vs. Wm. W. Smith.

The Act of Assembly of March, 1812 is a Bankrupt Law, and is no infringement of the Constitution of the United States.

Tilghman, Ch. J. I agree with the counsel for the plaintiff in considering the act of assembly on which the question in this case arises, as a bankrupt act. Such it certainly is, in its nature, although confined in its operation to a particular part of the state. It has the leading features of a bankrupt law, the discharge from all debts in consideration of the surrender of all the property of the debtor; and it possesses the details usually found in bankrupt laws for carrying the main design into effect. The validity of this law is contested as violating the Constitution of the United States in two respects; 1st. In assuming a power which has been *exclusively* vested in the congress of the United States. 2d. In *impairing the obligation of contracts*, contrary to the express prohibition of the 10th section of the 1st article of the Constitution.

1. Congress has power "to establish uniform laws on the subject of bankruptcies throughout the United States." (Art. 1. Sec. 8.) Hence it is contended, that no state has power to pass a law on the subject of bankruptcy.

There would be great strength in this argument if congress had exercised their power by passing a bankrupt law, because then the uniformity which they were authorized to establish would be broken in upon by the act of an individual state.

But it is to be considered, whether the power of congress is *exclusive even when they do not think proper to exercise it*; for thus the matter is at present circumstanced. Antecedent to the adoption of the Federal Constitution, the power of the several states was supreme and unlimited. It follows therefore, that all power not transferred to the United States, remains in the states and the people, according to their several constitutions. This would have been the sound construction of the constitution without amendment. But the jealousy of those who feared that the federal government would absorb all the power of the states, caused it to be expressly recognised in the 11th and 12th Articles of Amendment. Supposing then that there has been ceded to congress the exclusive power to regulate the subject of bankruptcy, whenever they shall think it expedient to exercise it, is it to be inferred that the states have debarred themselves from all exercise of power on the same subject when congress do not think it expedient to act? I can perceive no just ground for the inference. The exercise of this power by the states under such circumstances, could have no interference with the power delegated to congress, and it would prevent a situation of things very ill suited to the commercial habits of many of the states. For such are the hazards to which those who engage in trade and commerce are unavoidably exposed, that, I believe it has been found necessary, in all commercial countries, to relieve the unfortunate from the burthen of their debts, upon the surrender of all their property. There seem to be but three cases in which the several states have no power to legislate.

1. When they are expressly prohibited.

2. Where exclusive power is expressly vested in the United States.

3. Where the power vested in the United States, is in its nature exclusive.

The subject of bankruptcy does not fall within the first or second of these cases; and if it falls within the third it is only during those times in which Congress exercise their power on the same subject. The states are not to be divested of their power by inference, unless the inference be inevitable. Now that is not the case here. On the contrary the power contended for on behalf of the states, is in perfect harmony with the power granted to congress; a power to legislate on a *subject of necessity*, at a time when congress do not think it expedient to act.

I think the Constitution has received a practical construction on this point, although I know that the weighty opinion of judge Washington has lately been pronounced to the contrary. *Golden v. Prince*. 5 Hall, 502.

But to that opinion is opposed the strong argument of the Supreme Court of New-York, in *Livingston vs. Van Ingen*, in which it was adopted as a principle that in cases where power is affirmatively vested in congress, and not expressly taken away from the states, they may go on to legislate until their laws come in collision with the acts of congress. By *practical construction* however, I do not mean *judicial* decision, but practice sanctioned by general consent.

In the same section of the Constitution from which congress derive their power to establish an uniform system on the subject of bankruptcies, they have also given to them the power of fixing the standard of weights and measures. This they have never done, but the states have regulated them at their pleasure, and I believe without question. In the same section also there is granted to congress the power to provide for organizing, arming, and disciplining the militia, and yet all the states have passed laws on those subjects, much to the public benefit, and in harmony with the Acts of Congress. From all these considerations, although I will not say that a case admits of no doubt in which men of great talents have differed,

prohibited expressly by the Constitution; because to say the least of it, it would be setting a very bad example.

But it may be asked by what rule shall the meaning of these words *impairing the obligation of contracts* be restricted or limited if they are not taken in their full extent. I confess that to lay down a rule which would decide all cases appears to me to be very difficult, perhaps impossible. We may be certain that particular cases are not within the meaning of a law, without being able to enumerate all the cases that are within it. To attempt such enumeration is unnecessary and dangerous, lest some should be omitted. It is safe to decide on each case as it arises. It is probable that so far as respects contracts between individuals, the principal mischiefs which the convention meant to remedy, were those which arose from *tender laws*, and laws by which creditors who sued for their debts *were compelled to take property upon an appraisement*. Tender laws are expressly mentioned, yet they would have been included in the general words, for they certainly alter the obligation of the contract. Laws of this kind impair the contract, by giving an advantage to the debtor, without any consideration in favour of the creditor. Bankrupt laws are essentially different. They afford, in many instances, advantages to both debtor and creditor. The debtor is discharged on condition of surrendering his property without delay for the benefit of his creditors. The creditor is often a great loser, but he is sometimes a gainer by the means which are offered him of compelling the debtor to a full discovery of his property, and obtaining possession of it more quickly than in the usual course of law. The bankrupt system has been adopted in countries the most tenacious of the rights of creditors, of which England and Holland are examples: so that without straining it might be considered as an excepted case, when laws *impairing the obligation of contracts* were mentioned. So it seems to have struck both individuals and public bodies about the time of the adoption of the Federal Constitution. I well remember, that very soon after its adoption,

the subject was brought before the legislature of Maryland, upon the petition of a gentleman who prayed to be discharged from his debts, on the surrender of his property for the benefit of his creditors. Several members of that legislature had been in the convention by which the Constitution had been recently formed. Doubts were entertained as to the right of the state to pass the law. But the prevailing opinion was in favour of the right, and the petition was granted. From that time to this, Maryland has been in the habit of making such laws. I am not exactly informed how many other states have followed her example, but I understand that Rhode Island and New-York are among the number. Judicial decision is not wanting in favour of such right. Judge Washington, as I have mentioned, is against it. The Supreme Court of New-York were for it in the case of *Penniman vs. Meigs*. 9 Johns. 325. This court has never decided directly upon the point, but they have discharged, without bail, where persons have been sued here who had been discharged from the obligation of their contracts by laws of other states. I refer to the cases of *Hilliard et al v. Greenleaf*. 5 Binn. 336, in a note, and *Boggs v. Teackle*. 5 Binn 332. We are now called upon to decide whether an act of assembly of this commonwealth be void because of its violating the Constitution of the United States. That this court possesses the power, and that it is bound in duty to declare a law void when it violates the Constitution of this state or of the United States, has not been denied by the counsel for the plaintiff. It is a point on which I am well satisfied, but at the same time it is certain that it is a power of high responsibility, and not to be exercised but in cases *free from doubt*. Such has been the opinion frequently expressed by judges of the highest respectability, in different states, and sanctioned by the Supreme Court of the United States. I will not pretend to say that the meaning of that part of the Constitution on which this question arises is *clear*, but I may safely say that it is *doubtful*. According to the established principles of construction, therefore, in doubtful cases, I am of

opinion that the law of the state is *valid*. It follows that judgment should be entered for the defendant.

I am authorized to say, and I say it with pleasure, that my brother *Duncan* is of the same sentiment as the rest of the court, although he gave no formal opinion; not having heard the argument.

INSTRUCTIONS FOR EXECUTING A COMMISSION.

1. The commission may be executed by any of the commissioners, without the others, but all the commissioners should have notice of the time and place of executing it.

2. Prior to the execution of the commission the commissioners must take the following oath, which may be administered by any person authorised by law to administer oaths, *viz.*

“ You shall, according to the best of your skill and knowledge, truly and faithfully, and without partiality to any or either of the parties in this cause, take the examinations and depositions of all and every witness and witnesses produced and examined by virtue of the commission about to be executed by you upon the interrogatories now produced and left with you, so help you God.”

Get a certificate that the person who administered the oath is qualified by law so to do.

3. In case the commissioners think necessary to employ a clerk, the following oath must be administered to him by one of the commissioners, *viz.*

“ You shall truly, faithfully, and without partiality to any or either of the parties in this cause, take and write down, transcribe and engross the depositions of all and every witness and witnesses produced before and examined by the commissioners or any of them, about to be executed, as far

forth as you are directed and employed by the said commissioners or any of them to take, write down, or engross the said depositions or any of them, so help you God."

4. When the commissioners are sworn, they will examine the witnesses separately upon interrogatories annexed to the commissions, and will first administer to them the following oath:

"You are true answer to make to all such questions as shall be asked you upon these interrogations without favour or affection to either party, and therein you shall speak the truth, the whole truth, and nothing but the truth, so help you God."

5. This oath being administered, the general state or title of the depositions, preparatory to the examination of the witness, must be drawn up in the following manner.

"Depositions of witnesses produced, sworn and examined on the _____ day of _____ in the year _____ by virtue of a commission issued out of the _____ to us _____ directed for the examination of _____ witnesses in a certain cause there depending and at issue between _____ Plaintiff and Defendant on the part and behalf of the _____ as follows:"

6. Immediately under this title must follow the name, place of abode, addition and age of the witness, thus:

"A. B. of _____ aged _____ years and upwards, being produced, sworn, and examined in behalf of the _____ in the title of these depositions named, doth depose as follows, viz. First—To the first interrogatory he saith, &c." (go on with the witness's answer.) "Secondly.—To the second interrogatory he saith, &c." and so on throughout. If he cannot answer, let him say "That he knoweth not."

7. If there be any cross interrogatories, the witness will go on thus:

"First—To the first cross-interrogatory, he saith, &c." and so on throughout.

B. When the witness has finished his deposition let him subscribe it, and the commissioners will certify as follows:

"Sworn before
 A. B.
 C. D.
 E. F. } Commissioners."

If the deposition consists of more than one sheet, the commissioners should set their names in the margin, or at the foot of each half sheet—and so on with the next witness.

The papers marked and which are annexed to the commission, must be endorsed by those of the commissioners who execute it, in this manner.

"At the execution of a commission for the examination of witnesses between plaintiff and defendant this paper writing was produced and shown to and by him deposed unto at the time of his examination before

A. B.
 C. D.
 E. F. } Coms."

When the witnesses are examined, their depositions are to be fairly copied on paper, after which the commission must be thus indorsed:

"The execution of this commission appears in certain schedules hereto annexed.

A. B.
 C. D.
 E. F. } Commissioners."

The depositions must be annexed to the commission, and then the commission, interrogatories, and depositions must be folded into a packet and bound with tape. The commissioners set their seals in the several meetings or crossings of the tape, endorse their names on the outside, and direct it to the clerk of the court from which the commission issued.

*When the commission is thus executed, made up, and directed, it must be delivered by *one of the commissioners, per-*

• This is necessary only, it is believed, in the state of New-York.

senally, to some person who is coming to the place where it is to be delivered, and who must be able, on his arrival, to make the following oath before one of the judges:

“That he received the same from the hands of A. B. one of the commissioners, and that it hath not been altered or opened since he so received it.”

(Or it may be delivered to the court by one of the commissioners.”)

THE LAW MARITIME.

An Argument, in Behalf of a Bill to Ascertain the Jurisdiction of the Admiralty in the House of Lords.

BY SIR LEOLINE JENKINS.

MY LORDS,

It is with the greatest disadvantages imaginable, that I do appear before your lordships, since it is expected that I should support a bill, which my lord chief justice Vaughan has represented to be against the common law, and a flat contradiction to several statutes; for I have not only the infinite want of his learning, reason, and experience, but I am to go out of my own profession; I am to expect no aids from the civil law, but am to make out what I shall offer to your lordships, by the peculiar law and practice of this kingdom.

However, since his royal highness expects, and your lordships are pleased to command, that I should lay before you what I have to say, I shall do it with all submission possible to your lordships, and with that deference which I owe to the person and judgment of my lord chief justice.

My lord chief justice was pleased to begin his argument with three statutes; I shall not need to recite or repeat them, your lordships, I doubt not, remembering the words and purport of them very exactly. But I must crave leave to speak to that which was observed upon them.

The learned chief justice was pleased to say, that they were the foundation of the admiral's jurisdiction; but with submission to his lordship, I do conceive the jurisdiction of the admiral was founded long before. For those statutes imply not only, that there was such an officer, but that he had such a jurisdiction, in Edward III.'s time, long before this statute, intending no more but to reduce him to that standard.

That there was such an officer in Ed. III.'s time having a jurisdiction in maritime causes, I will produce to your lordships a copy of a roll in the Tower; 'tis the patent of Robert de Herle, wherein, 1. He has his jurisdiction set out to him as to certain causes that is maritime. 2. Over certain persons, viz. seafaring men. 3. His law, whereby he is to govern himself, *prout de jure et juxta legem maritimam*; which we say, are the laws of Oleron, the constitutions of the admiralty, and the imperial civil law.

In the 12 Ed. III. there is another roll, *de articulis super quibus*, &c. 1. For the carrying on of the proceedings, and re-establishing that judicature that his grandfather Ed. I. and his council had ordained, for the preservation of his sovereignty and admiralty in the seas. 2. The interpreting, declaring, and asserting those laws, which his predecessors had made for seafaring men; which laws (says the record) were corrected and published by Richard I. coming from the Holy Land.

There is a third Record mentioned in my lord Coke and Mr. Shelden, *de Superioritate Maris*, which imports, at least, these two things.

1. That there were then (22 Ed. I.) Maritime Laws, Statutes, and Ordinances, and Defences in being.

2. That the admiral had then all manner of cognisance, *haut et basse justice*, upon all facts that might appertain to the sovereignty of the seas.

This record has the countenance of 22 Ed. I. 22 Ed. II. which was 1294; and the 13 Ric. II. which was *Anno* 1389.

That which I conceive is a natural inference from these three records put together is 1. That the admiral was then in possession of a jurisdiction over maritime persons, and in maritime causes, and that he had all power and coercion, nay, of life and limb, within his jurisdiction; for so the words *haut justice* does imply, and it continued in him till the 28th of Hen. VIII.

2. That the causes we humbly contend for, are so many species of maritime causes, though they may have some circumstances in them done upon the land, and are so reputed by all nations; and are every where adjudged, not by the municipal or ordinary law of the land, but by a law peculiarly adapted to the nature of those causes. Causes, my lords, I say, which have no rules for them in the common laws, but have been always adjudged in the admiralty courts as properly belonging to that jurisdiction.

3. That these statutes are capable of interpretation, that may preserve to the common law all its just pretensions, and yet leave the admiral in possession of all these causes which are properly his, and which he desires may be declared to be his right.

I hope, my lords, I may take leave to measure maritime causes, by the same rules and reasons that we do other distinct classes and species of causes; the *mere locality* does not make a cause maritime, but the analogy that this species has with others: For it was observed yesterday, that the sealing of a bond or lease *super altum mare*, would not make it cognisable in the admiralty; I submit it to your lordships then, whether the sealing of a charter-party to go from London to Lisbon, can make the cause a land cause; since the main scope of the charter-party is to be performed on the sea, and nothing of the undertaker's business is to be performed upon the land; and therefore by a parity of reason, that case ought to be cognisable in the admiralty, and not at common law.

So that it is the law only that makes the provision, and is decisive in the case, and is to determine whether the cause

be maritime or not. And if it be inquired, whether there be a breach of charter-party, by not coming in due time to the port designed, by taking a wrong course, or by not delivering and keeping the goods, be a maritime cause; we say, with submission, that it is, because the maritime law does determine when any thing of fault or neglect shall be imputed to the master, or when he shall be excused, as in irresistible casualties. And the admiral being a *judex ordinarius*, (as Bracton calls such as have their jurisdictions fixed, perpetual, and natural) for one hundred years before this statute; it shall not be intended to restrain him any further than the words do necessarily and unavoidably import.

For instance, the statutes say, that the admiral shall intermeddle only with things done upon the sea: it will be too hard a construction to remove him further, and to keep him only *super altum mare*; if he had jurisdiction before in havens, ports, and creeks, he shall have it still; because all derogations from an antecedent right are odious, and ought to be strictly taken.

Besides, when a law is made upon some emergent impulsive cause, the lawgiver shall not be understood to make further provision than for that cause; nor to redress any more than the particular mischiefs complained of. I shall therefore inquire what those mischiefs were that occasioned this statute.

Prient les communes que comme les Admiraux, et leur deputez teignent leur Sessions in diverses places dans le Royaume, si bien dans franchises come dehors, accroachants a eux plus grand pouvoirs qu'a leur office appartient, au prejudice de notre Seigneur le Roy, et de la comon ley, et grande emblemisement de divers franchises, et en empoverissement du common peuple, que pleise ordeiner et etablir leur pouvoir en cet present parliment, qu'ils ne se meslent, n'emprignent sur eux connoissance de nulles contracts, covenants, regrateries, ny de autres choses, les quels devoient, ou pourroient estre terminez devant autres juges de notre Seigneur le Roy, dans les quatre mers d'Angleterre.

“Le Roy veute que les Admiraux et leur deputez ne se meslent de null chose faite dans le Royaume, mes solement de chose fait sur le Mer, selon ce que a este duement use en temps du noble Roy Edw. ayel de notre Seigneur le Roy qui ore est.”

That is, they complain that the admirals came into the franchises of lords; but the lords of franchises had nothing to do with trying of maritime contracts by the maritime law; the invasion therefore made upon them, was in meddling with the land affairs properly depending before them, which the admirals had no right to do, and the intent was only to reduce them to the ancient standard of Edw. III. time. As when they pretended to the cognizance of *Regraterie*, the lords of franchises and others had reason to complain: for by the 25 of Ed. III. cap. 3. and 2 Ric. II. forestallers and regraters were indictable only in the king's courts; and if at the suit of the king, the king had the penalty; if of a common person, he was entitled to half; and by the admiral's assuming a jurisdiction, they were deprived of these advantages.

That there are other countries, as Spain, France, Sicily, Denmark, Sweden, and the Seven Provinces, that do confine their admirals to sea affairs, but there is no country whatever that denies the cognizance of the causes now in question; and there is no country that I know of, which has a *Lex terræ*, or any rules in their ordinary municipal law, for the determination of them. Nay, I may truly say, that every place in Europe intrusts the admiral with a more ample jurisdiction than England does.

But, my lords, we are in England, and I am to offer to your lordships, what interpretation the statute of Ric. II. is capable of, according to the rules and understanding of the laws of England.

First then, the admiral being an ancient judge, of a fixed and known jurisdiction, we are to interpret these statutes which derogate from that right, he is founded in *de jure communi*, in a strict sense. And my lord Coke says, that a gene-

ral statute is often construed particularly, upon consideration had of the causes of making the act, and by comparing the several parts of it together.

First of the cause; There are no less than eight petitions of the commons against the admiral, from the 13 Ric. II. to the 11 Hen. IV. from 1389, to 1409, in a matter of twenty years; and on three of them chiefly these acts were made.

The substance of those petitions was, that the Admiral and his officers held pleas of contracts arising within the bodies of counties, of trespasses, debts, quarrels, wears, kiddles, breaking open of houses, carrying away goods, illegal imprisonments, excessive fees and extortions; but there is not one syllable of complaint, that they held plea of contracts in foreign parts, of charter-parties made within the realm, of building, repairing, or victualing ships: and whether it is possible to be supposed, that there should not be some of these causes depending before such a jurisdiction in those days, that would judge of all things by the civil law, in time of traffic as this was, especially into France? And whether they could have omitted glancing at some one of the things specified in this bill, had it been then thought a grievance. For it is observable, that in the 14 Ric. II. there are twelve Statutes made, and eleven of them concern trade and navigation.

Besides that, there is not any mention of them in these petitions, I appeal to the year books, and the abridgers of them, whether there be any instance of a prohibition brought in any of the cases now before your lordships, from the utmost footstep of judicial records, down to the 13 Ric. II. And if there is no instance to be given, that any article in the bill was prohibited before Ric. II's time, and not one syllable in the eight petitions upon which those acts were founded, I will hope it is evinced, and there was no design to diminish the admiral's proper jurisdiction, but only to restrain the innovations and exorbitancies of it; and consequently, that he is still in possession of the cognizance of all maritime causes as before those statutes.

My lords, I need not enquire what are maritime causes in the general, or what species there are of them; it is sufficient for me to show every one mentioned in this bill to be of that kind. And that I hope to do,

1. From the universal acceptation of the civil law.
2. From good authorities, judicial records, and books in the common law.
3. From the patents of the admirals ever since Ric. II's time.

I shall begin with foreign contracts, 1. Negatively, that the common law cannot hold plea of foreign contracts. 2. That many writers expressly allow the admiral to do it.

Littleton, *ten. l. 3. Sect. 440.* says, a thing done out of the realm, cannot be tried within this realm by the oath of twelve men. Fitz, *Nat. Br. 114 B.* says, that if an English merchant be spoiled of his goods by merchants strangers, *extra Angliam*, and have no justice done him, he shall have a writ out of chancery against such wrong doers and their goods, and both shall be detained till satisfaction. But an English merchant shall not have such a writ for any debt due to him, upon a contract made beyond sea, if the debtor should come into England with his goods. I must confess there is a *quære* added to it; but had the inquiry been before him, whether there were any writ to be had at common law in this kind, that would run either by land or water, he would have left out his *quære*, and resolved, that there was none; and that the remedy must be had from the admiralty process.

In Brook and Fitz Herb. r. account, there this is *dictum* of two judges, "Ceo que fait fait en Britain n'est pas triable icy; et Thorpe, coment poit ceo estre trie, car ceo que fait fait Britain entre merchant et merchant ne poit estre trie autrement, que par le ley merchant mes nous sommes icy al common ley, ou chose fait par de la en Britain ne poit estre trie."

And I have a note out of the journal of this honourable house, in the parliament of 31 Hen. VIII. fol. 16. a bill there read the 23d of May, "perquam debita in partibus transmari-

nis per Syngrapham concessa habilia efficiantur in hoc regno Angliae implacitari. Quae Billa jam primo lecta et rejecta."

I will make no inference from criminal causes to civil; it is certain that treasons or felonies committed beyond sea, can be tried in England: and these are things of greater consequence to the public peace and safety, than bills and bonds are. But shall next prove affirmatively, that foreign contracts are triable here by the admiral, and that many writers of common law have expressly allowed it.

In the Terms of the Law, (a very ancient book) an admiral is defined to be an officer under the king, who has authority upon the sea, (and among other things) "de faire droit de contracts par enter partie et partie, concernant chose faite sur, et outre la mer, and for that purpose he has his court of admiralty. St. Germain, in his book called Doctor and Student, l. 2. c. 2. says, it has been often argued in the laws of England, what matters of right ought to be determined by the laws of England, and what by the admiral's court. And also if an obligation bear date out of the realm, it is said in the law, and the truth is, that it is not pleadable at the common law. So in the black book of the exchequer, p. 29, 30.

To this I may add, *Brownl. Rep. 2d Part*, where it was urged by justice Haughton, (on a motion for a prohibition to the admiralty, 8 Jac.) that the intent of the statute of 13 Ric. II. was not to inhibit the admiralty to hold plea of any thing made beyond sea, but only of things within the realm, which appertain to the common law; and Walmsby and Warburton justices, agreed, that if an obligation bears date beyond sea, or be so local that it cannot be tried at common law, a prohibition shall not go. Lord chief justice Fleming said, that that court could not hold plea of a contract made at Marseilles, and therefore would not prohibit the admiralty from holding plea. "Et issint fuit le ley prise du temps le roy Edw. I. quand aucune doubt fuit fait sur cette mattiere, quod par le roy et son conseil fuit determine comme s'ensuit." This law in the black book is cited in Latin by chief justice Anderson:

“ Haec est ordinatio Reg. *Edw.* anno secundo scil. quod quilibet contractus initus et factus inter mercatorem marinarios et alios ultra mare, sive infra refluxum maris, vulgaritur vocat. *Flood-mark*, erit triatus et terminatus coram Admirallo et non alibi.”

There are two other statutes recited in the same period; and in the close of all the chief justice adds,—“ accordant a queux ordinances, les admiraux ont use leur authorites en les lieux avant dits tanque a/ce temps, cy bien pour choses faites outre la Mer, sur la Mer, comme entre le *Floud-mark*, comme le *Low-water-mark*, queux prouve que cest lieu est d'estre prise comme parcell del mer, hors de chacune counte.”

So that the judgment of foreign contracts is of right in the admiralty; and there is nothing in all the ancient books of common law, to authorise the late method of drawing maritime causes to the cognizance of the common law. It is a practice the civil law declaredly abhors; it feigns a thing impossible in fact, and without the least colour of equity; and though there are many fictions in our own law, yet they are such as are grounded in some express written text, and such as are both possible and equitable. And as the jurisdictions abroad, where the civil law obtains, are numerous, and there are many parliaments, and (as I may say) many Westminster halls, if such a fiction were once to take place, they would all be quickly confounded by the parliament of Paris and Grenoble.

The 2d thing in this bill, is mariners' wages, freight, and breach of charter-party.

The cognizance of mariners' wages is not much denied to belong to the admiral, though contracted for upon the land. 14 Ric. II. Rot. Parl. 11. 37. The owners of ships trading out of England into France, complain to parliament, that mariners, by a combination, did exact twice as much salary and freight, as they had used to do in king Edward III.'s time, and would not serve in English bottoms, to the detriment of the owners and the navy of England; for redress whereof they pray, that the mayor and bailiffs of towns, where such mariners lived, might have power to punish them, at the suit of every man

that complained. To this the king consents; but how? Not to the prejudice, or in derogation of the admiral's lawful and ancient jurisdiction, but answers, that he will charge his admirals to ordain, that the mariners should have that which was reasonable for their service; and to punish them if they did otherwise. Mariners were then hired at Wapping and the bank-side, as now they are, and the *querela* did arise upon the land; yet the admirals were ever allowed to have the cognizance of it; and not only of this, but also in those days, "*de tous mariners, victuals venant hors de Mer, et issuant hors d'icelle, s'ils sont bons, ou raisonnable, ou nemy, et ausi des artificers et laborers demeurant pres les costes de la Mer, s'ils preignent excessive pour leur labour ou netay.*"

But to come nearer home, serjeant Rolls, in his abridgment, 533, *nu.* 21. says, it was judicially resolved by the King's-Bench court, that a suit for mariners' wages would not lie *hors del admiraltie*; and the same, he says, was resolved in the breach of a charter party.

And if mariners wages belong to the cognizance of the admiralty, why not freight as well, freight being the mother of wages. When owners and their freighters differ, the one demanding the wages due by charter-party, and the other pleading damages sustained, or imbezzlement of their goods, when the matter is heard in the admiralty, the stile of the court is to assign ten or twelve days to the merchants to prove their damages; and where the damage is proved, the court allows stoppage of freight *pro rata*, by way of compensation; where it is not proved, the whole freight is paid with costs; however, if the mariners be not charged, the court orders so much of their freight to be brought in, as will pay off the mariners. That the dispute of the owner and the merchant may be no hindrance, nor an occasion of arresting the ship for their wages, and by that means prevent her going to sea again. Whereas if the owner and merchant go to common law, the owner will recover his whole freight, as far as the charter-party is proved, nor can he plead stoppage in bar: Nor, it may be, ar-

sent the owner or master for his damages, they perhaps being insolvent, or not appearing, since they may as well sue for their freight by letter of attorney.

Besides this, in a trial at law for damages, some of the ship's crew must be necessarily had to witness how it happened; and while they are detained at home several terms, their families must starve: whereas the whole affair is determined within a few days in the court of admiralty.

The next article in the bill is concerning building of ships, and victualing of them. In this serjeant Rolls also allows a prohibition will not lie, and that it was so agreed by the whole court in the case of Tasher and Gaell. 42 *Eliz.* There is another case of one Rolf, who agreed with Freeman to build him a ship at Woolwich, and was to have so much for his own work, his servants their victuals, and so much for timber and materials. Freeman builds and furnishes the ship: Rolf takes possession of the vessel, and afterwards sells her to another, who accordingly possessed himself of the ship. Rolf arrests her by an admiralty process for his work and materials. The other prays a prohibition, and suggests the three statutes, and alleges that the contract was in Kent, the work done, and the materials furnished there, and a prohibition was granted. But the court being more fully informed of the matter, awarded a consultation.

39. *Eliz.* Buckhurst arrested a ship belonging to one Ascough, for the materials and necessaries which he had furnished for the voyage; Ascough appeared not, but another bailed the ship, and then obtained a prohibition, but afterwards a consultation was awarded; and in the rule of court for the consultation, there is this remarkable expression: "*Quod prohibitio illa improvide emanavit, et nolumus per hujusmodi maliciosas suggestiones admiralli cognitionem derogari.*"

31 *Hen. VIII.* Middleton and other merchants were sued before the king's council in the north, upon a maritime business, the defendants complained in chancery, and obtained a *supersedeas*.

11 *Hen. IV.* Wagloff sues Johnson in the admiralty, and is condemned; the cause is appealed to chancery, and is reversed; and afterwards issued a commission of review. And 10 *Hen. IV.* there was a like case, and it is remarkable that for many years after this, there was no prohibition, nor any action upon the statute in any of these instances.

For the 4th article, the jurisdiction cannot be disputed; for the admiral always had, and still has the care of the royal navy; he has a commission to execute all statutes about wears, and for personal contracts, if at Wapping, Gravesend, and in the mouth of the Thames; and therefore I shall not add to your lordships' trouble upon that head.

Having thus spoken of the particular articles of the bill, I think it material to observe next to your lordships, that this bill in the general, for ascertaining the jurisdiction of the admiralty, is the same in substance with the act of council 1632, subscribed by the twelve judges and the attorney-general, in the presence of the king, his majesty's father.

This act of council was the result of many solemn debates, and not the effect of artifice and surprise: For the king having taken notice of several differences between his courts of justice, issued out a standing commission to his privy council to hear all questions of jurisdiction between his courts, and to frame such orders and regulations as should be fit to be established. This act of council was enrolled in the several courts of Westminster, as the resolution of all the judges, and as a standing rule to be observed for the future. And it was punctually observed as to the granting and denying of prohibitions, till the late disorderly times bore it down, as an act of prerogative prejudicial (as was pretended) to the common laws, and the liberty of the subject.

Yet it was not long before the usurping powers found it necessary, for the encouragement of trade and navigation, to make several ordinances (no less than four in all) to the very same effect with this bill, even after they had abolished the office of high admiral. Those ordinances being vacated by

his majesty's most happy return, the most considerable merchants in London (above an hundred in number) petitioned his majesty, that the jurisdiction of the admiralty might be re-established, for the benefit of trade and navigation; annexing this act of council as the truest measure of a good establishment.

There have been divers overtures since made to his royal highness, from many hundred families that suffer in their trade, especially material men, for want of such an establishment; but his highness will not suffer such addresses to anticipate your lordships, who will, he doubts not, take notice of these grievances in your own time and method.

This being true in fact, the inconveniencies to the public are very great, for want of some settlement in this affair; and I shall only crave leave to lay before your lordships some few of them, which from what has been said, does already in some measure appear, and may be reduced under these two heads.

1. The uncertainty of jurisdiction, and consequently of bringing any cause to a final issue in the admiralty, by reason of prohibitions.

2. The incompetency of the common law courts, to give relief or execution in maritime causes.

From the first head, that is, uncertainty of jurisdiction, arises dangers, delays, and extraordinary charges. As for instance, the admiralty has been time out of mind in possession of judging mariners wages, &c. without danger of being sued for double damages upon the statute; but there was a late case in Trinity term 1668, where one Rand brought his action in the admiralty against Gosling's ship for his wages, having been hired as master of the ship from London to Lisbon, and back again; and also for disbursements made at Lisbon to the ship's use, and sentence was given for Rand. Gosling appeals to the delegates, and they affirm the first sentence; and Gosling being taken in execution, pays the money with costs of suit; but the matter ended not here, for Gosling brings his action against Rand for double damages, as having sued in the
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admiralty against the statute 20 *Hen. IV.* The trial being at Guildhall, the jury found for the plaintiff Gosling, and he recovered eighty pounds, not from Rand, (for he happened to die pending the action) but from his poor relict and administratrix.

And this action might have been laid as well against the judge, the register, or the proctor, as against Rand, and not only in this, but in any other case: For there is not that sort of case to be named, wherein the admiralty has not been some time or other prohibited, either for want of being heard, or else because the matter was not fully before the court. And where a prohibition has been granted, how unjustly soever, according to that doctrine, an action upon the statute may be brought, and the damages commonly given, are greater than the costs of the whole prosecution in the admiralty amounts to.

Nothing can be more pernicious to sea-faring and trading men, than delays in their law-suits; and therefore every maritime country in christendom, has a separate judicature for differences among merchants and sea-faring men. So had we once, we had a law merchant, and by it the proceedings were *de die in diem*; we have yet left the form of a court of admiralty, and are bound by it to proceed not only *de die in diem*, or as summary as a judgment *de jure gentium* can be, but from *tide to tide*. That is the ancient style of the admiralty, and not without reason, since there is not one cause in ten before that court, but some of the parties, or witnesses in it, are pressing to go to sea with the next tide. And the mariners had better lose the wages of a whole voyage, than not go off the next that offers itself. They and their families would be starved by staying at home till the term, and then the wages recovered would scarce quit the costs, when every one is forced to bring his action singly (as he must) at common law.

But now it is a frequent practice, to suffer plaintiffs to come first to a hearing in the admiralty, and then appeal to the delegates, and after they have affirmed the first sentence, the defendant sues out a prohibition. This obliges the plaintiff that has recovered in two instances, to begin again at common

law, or else to sit down by his loss; or if he obtain a consultation, the admiralty must not allow him either damages or costs, in regard of the expenses at common law.

I have already shown something of the incompetency of other courts for marine causes, but may add, that it frequently occasions an utter loss to the merchant, and is a sad discouragement to trade; as in the following instance:

A Spanish merchant owes me money; I understand he hath a ship or goods come into the river; no process but that of the admiralty will reach upon the water; when I have arrested them, and good bail is offered, I cannot refuse to accept it, and the ship or goods must of course be freed and delivered to the consignatory. When I declare in the admiralty for freight, breach of charter-party, or the like; the Spaniard, by his attorney, or his bail, flies for a prohibition; and suggests, that the contract was not made *super altum mare*, but upon the land at Malaga; hereupon the admiralty is prohibited to proceed, and I am left without remedy; for the ship or goods, which I had arrested, are gone, my debtor is in Spain, and I can have no action against the bail in any other court. Not unlike this is Bridgman's case in *Hobart's Rep.* 12. but this I shall have another occasion, under your lordships favour, to speak to. For such losses as these are frequent; and which is more considerable, an English merchant here owes money upon a foreign contract to a Spaniard, he sues for it in the admiralty, but the English defendant flies to the common law, and has a prohibition. The Spaniard in his trial at law produces the contract in the form usual beyond sea. The defendant pleads *non est factum*: How can the party be relieved against this plea? For the original contract subscribed by the contractors, and the witnesses, is a record that the notary in Spain will not part with, without forswearing himself, and losing his office; the copy exemplified will be no evidence to a jury, nor can the notary and the witnesses be had and heard *viva voce*, without a thousand contingencies; whereas the Spaniard exhibiting his instrument upon oath, for a true and real

instrument in the admiralty, the adversary must either confess or deny it; if he confess the instrument, (as notarial instruments seldom are denied) there is so much in proof before the court as to judge of the contents of it; if it be denied, the plaintiff may have a commission into Spain *pro scrutinio*, and the copies exhibited here may be inspected, and compared with the original remaining in the notary's hand. And the magistrates of the place will certify, that the notary is a public and authentic person there, to whose acts credit is given in judgment, and then that instrument is before the court in due form of proof; without this help of the admiralty, the stranger would be without remedy; which how much it hath been made a reproach to the nation, there are others here that can witness as fully as I can.

All merchants abroad make their contracts according to the marine or civil law, the differences therefore upon those contracts, should not be judged by a law that hath nothing in it, either provisional or decisive in such cases.

And pardon me, my lords, if I say the judges of the common law cannot so easily or naturally take notice of the marine law. There are so many terms and clauses (which are *vocabula artis, et clausulae juris*) in every contract, that it is very hard to make an English jury understand them; not to speak of the differences there are among the civil law writers themselves about the true meaning of them.

So if a master of a ship sue for his freight, or wages, by letter of attorney at common law, he may recover without appearing: but if the merchant have damage by ill stowage, imbezzlement, losing his market by the masters default, how shall he recover, in case the master hides himself, or be insolvent? What remedy or compensation can the common law give? The court of Chancery indeed may relieve, if the master appears and proves solvent; but the civil law allows a just and adequate compensation in all these cases, and will in the same judgment stop so much of the plaintiff's wages, as the damage of the merchants defendants shall amount unto. The same

may be observed of mariners' wages, whose mutiny, desertion, neglect, or thieving, is punished by a deduction of their wages, *pro rata* of the damage, which cannot be done at common law.

But the greatest discouragement of all is, that of material men; such as furnish tackle, furniture, or provisions, for the repairing of ships, or setting of them out to sea: When they are not paid at the time appointed, they arrest the ship; which will bring all the part owners to answer for it; but if, when they declare in the admiralty, a prohibition be granted, the remedy will be against the master alone, who, though he bespoke the materials, is commonly not worth the twentieth part of the action. And these material men have often offered to make it demonstrable before his royal highness, that if the ship shall be subject to their arrest, without danger of a prohibition, (because the contract was upon the land) an one hundred sail of ships shall be furnished, and set out with more ease, and less time, than five now can be, as the practice of prohibiting hath lately been. For there is not any master but may command one thousand pounds worth of goods upon his ticket in a morning, when the material men do know that they may arrest a ship with effect, in case he and his owners do not come, and give each material man such money or security as will content him. Whereas if they be forced for their remedy to common law against the master, and his part owners, (who are most commonly persons unknown, and at a distance) they had better keep their wares in their shops, than pursue so many upon such unequal terms.

But then it is objected, that prohibitions are the king's writs, the benefit and security of the subject, and no inferior court ought to pretend to be exempt from such a necessary restraint.

With submission to those learned persons, the admiralty does not pretend in the least to be exempt from prohibitions; and they will nevertheless be subject to prohibitions, though it should be declared by law, that no prohibition shall lie in

any of the four cases specified in this bill. The clergy in their *Articuli Cleri*, presented at Lincoln, complained, that prohibitions were issued out against the spiritual courts to their excessive grievance. Upon which the king by that law sets down five or six cases, wherein a prohibition should not lie, and as many in which it should lie. The issue was, that the courts christian never attempted any thing wherein the law did then limit them; and yet we see, that in cases not specified in that law, prohibitions come out against them now as thick as ever. This will be the case of the admiralty with some advantage; for then it would be out of danger of the penal statute, and undisturbed in the four articles specified in the bill; but as to other matters, it will be still as subject as ever to the courts of Westminster-hall. Prohibitions, my lords, most properly lie to a court wanting jurisdiction; but where the subject is aggrieved by male proceedings, or wrongful judgments, the proper remedy is by appeal to his majesty in chancery. And since prohibitions are never without charge and delay, two great discouragements to trade, and I may presume to say, have been sometimes granted with excess, as appears by the answer to the *Articuli Cleri*, we hope the same course may now be taken, as was by that statute, *viz.* to determine where a prohibition shall lie by law, and where not.

There is another cause of bottomry, which hath as much loss and discouragement in it as any other. Many instances might be given from our own registries; but I choose them rather from the books of common law, as least partial to us; and out of many thence which might be produced, I shall mention but one. In my lord Hobart's Reports, *fol.* 12. where the case was this:

One Bernard, owner of a ship, makes Williams master of her, and sends her into Spain, and the ship happens there to come into distress. Williams applies himself to one Bridgman, an English merchant residing there, and prevails with him to lend fifty pounds to repair and furnish his ship, and for his security, impawns the ship; the ship coming into England

and Bridgman being not paid his money, arrests the ship, and declares in the admiralty against the owner of the ship; who being condemned to pay the money, sues a prohibition, and suggests, that the master had no power to pawn his ship. Hereupon Bridgman, who had lent his money *bona fide*, to preserve the ship from perishing, has his pawn taken from him, and is left to his remedy against the master; indeed if the master be solvent, he must pay the money, from which he never had any advantage; if he prove insolvent, Bridgman must lose it. Which will be a sufficient discouragement to him, and every one else, another time, from lending their money to preserve an English bottom. The reason of this prohibition must have been, because the contract was made upon the land in Sevil. And yet the judgment of the admiralty is there approved of, in allowing the master power to pawn his owner's ship for the preservation of it, though it was disagreeable to the rules of the common law.

It is said, that the common law courts have often judged these cases; and when they do, they judge according to the marine law: and that what defect is in their law, as to arrests or executions on the water, may be easily supplied by a new act in favour of them, and not of the admiralty.

It is true, my lords, that the legislative power is at liberty to trust whom it thinks fit, with his majesty's jurisdiction upon the water; but we hope, that as the admiral was vested with this jurisdiction before England knew *Magna Charta*, and that we have done nothing to forfeit that title, that we have done nothing contrary to his majesty's dignity, contrary to the just rights of his subjects, or to the prejudice of his neighbours, that we shall not be laid aside. And as for that, that the courts of common law are willing to judge marine causes by the marine law; I will not take upon me to say, how far they may recede from their own law in those cases, wherein theirs and ours do differ; but I think they may as well ask the whole spiritual jurisdiction, and say, they will govern their judgments

the usefulness of this science, is abundantly verified in a very modern instance, I mean, the pretensions of France over the Spanish Netherlands. For by the licensed manifesto's published on both sides, about three years ago, it will appear, not only how useful the professors of that law were to support the titles of their respective masters, and also how necessary the assistance of men, consummate in that science, would be to any neighbour prince, that had occasion to inform himself (as arbitrator or ally) as his majesty might have had, of the true state and merit of the differences. For the several points of devolution, renunciation, and succession, upon which those manifestos join issue, are neither to be thoroughly understood, nor rightly stated, but by a considerable skill and knowledge in the civil law. And in all such sort of intercourses or disputes, what rule or law can we go by, or how is it possible, my lords, to convince foreigners of what we say, but either from the principles and maxims of their own law, or else by that law, which is in some measure received by all, as the fixed and unalterable rules of justice.

However, we have no reason to fear the extinguishment which king James speaks of, since we owe the very name and being we have of a profession to his majesty's most happy return to, and his most gracious influence upon the church of England, and this her constant handmaid. And it is in contemplation of this revival, that the study of this law begins to flourish in the universities. And those members of colleges that are bound by their statutes to spend their time, and take their degrees in this science (and of these there are fifty-three persons indispensably bound in the university of Oxford) do not now say, as they did in the times of usurpation, that they are condemned to a jejune and barren study, by a three penny planet. But there is scarce a college or hall that hath not several volunteers, that, under the favour of his majesty, who so well knows the esteem of this profession abroad, have given in their names to this study.-

But whether this of encouraging so many young students, of satisfying foreign traders, of giving dispatch to mariners, and to material men the security which they like best, shall be esteemed real conveniencies or not; yet I hope, my lords, to conclude with something that will give all parties content, and must be understood to be a conveniency; it is, that we of the admiralty are content, that suitors may have their option of the court they would sue in: If mariners will go for their wages, owners for their freight, merchants for their damages, material men for their money, to the common law, we shall not in the least regret it: But if they choose rather to come to the admiralty, (as certainly they will not, unless they find the dispatch quicker, the proceedings less chargeable, and the methods of judgment and execution more suitable to their business) we desire leave to receive them, and to do them justice, without the danger of a penal statute, and without the interruption of prohibitions when once we are possessed of the cause. And this is all we desire.

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* The Editor neglected to state in the proper place that the tract here referred to, was written by a Prussian, whose name he was unable to ascertain.

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